

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	)	Case No. 19-34054-sgj11
)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
)	
Debtor.)	
_____)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adv. Proc. No. 21-03003-sgj
)	
Plaintiff,)	
	)	<u>MOTION for SUMMARY JUDGMENT</u>
v.	)	<u>and OMNIBUS MOTION to STRIKE</u>
)	
JAMES DONDERO,)	
)	
Defendant.)	
_____)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adv. Proc. No. 21-03004-sgj
)	
Plaintiff,)	
	)	<u>MOTION for SUMMARY JUDGMENT</u>
v.	)	<u>and OMNIBUS MOTION to STRIKE</u>
)	
HIGHLAND CAPITAL MANAGEMENT)	
FUND ADVISORS., L.P., et al.,)	
)	
Defendants.)	
_____)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adv. Proc. No. 21-03005-sgj
)	
Plaintiff,)	
	)	<u>MOTION for SUMMARY JUDGMENT</u>
v.	)	<u>and OMNIBUS MOTION to STRIKE</u>
)	
NEXPOINT ADVISORS, L.P., et al.,)	
)	
Defendants.	)	April 20, 2022
_____	)	Dallas, Texas

Captions continue on next page;
appearances begin on next page.

In Re:) Case No. 19-34054-sgj11
)
HIGHLAND CAPITAL MANAGEMENT, L.P.,)
)
Debtor.)
)
HIGHLAND CAPITAL MANAGEMENT, L.P.,) Adv. Proc. No. 21-03006-sgj
)
Plaintiff,)
) MOTION for SUMMARY JUDGMENT
v.) and OMNIBUS MOTION to STRIKE
)
HIGHLAND CAPITAL MANAGEMENT)
SERVICES, INC., et al.,)
)
Defendants.)
)
HIGHLAND CAPITAL MANAGEMENT, L.P.,) Adv. Proc. No. 21-03007-sgj
)
Plaintiff,)
) MOTION for SUMMARY JUDGMENT
v.) and OMNIBUS MOTION to STRIKE
)
HCRE PARTNERS, LLC (N/k/a)
NEXPOINT REAL ESTATE PARTNERS,)
LLC), et al.,)
)
Defendants.) April 20, 2022
) Dallas, Texas

Appearances:

For the Plaintiffs John A. Morris
(Via WebEx): Hayley Winograd
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue, 39th Floor
New York, New York 10017-2024

For Defendant Michael P. Aigen
James Dondero Deborah Rose Deitsch-Perez
(Via WebEx): Stinson, L.L.P.
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219

Appearances continued on next page.

Appearances, continued:

For Defendant John Dondero (Via WebEx):	Jeremy A. Root Stinson L.L.P. 230 West McCarty Street Jefferson City, Missouri 65101
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For Defendant John Dondero (In courtroom):	Clay M. Taylor Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Fort Worth, Texas 76102
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For Defendants NexPoint and Highland Capital Management Fund (Via WebEx):	Davor Rukavina Julian Preston Vasek Munsch, Hardt, Kopf & Harr 500 North Akard Street, Suite 3800 Dallas, Texas 75201-6659
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Plaintiff's Motion to Strike

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1 Wednesday, April 20, 2022

9:41 o'clock a.m.

2 P R O C E E D I N G S

3 THE COURT: All rise. The United States Bankruptcy
4 Court for the Northern District of Texas, Dallas Division, is
5 now in session, the Honorable Stacey Jernigan presiding.

6 THE COURT: Good morning. Please be seated.

7 All right. We have a long setting today in the
8 Highland Note adversary proceedings. We have one lawyer here in
9 the courtroom and many on WebEx. So let's start by getting
10 appearances. Who do we have appearing for the plaintiff this
11 morning?

12 (Echoing voices.)

13 THE COURT: All right.

14 MR. MORRIS: This is –

15 THE COURT: Go ahead.

16 MR. MORRIS: This is –

17 (Echoing voices.)

18 THE COURT: All right. Mr. Morris, we're getting an
19 echo from you. I don't know if you can hear what we hear, but
20 do you have two different –

21 (Echoing voices.)

22 MR. MORRIS: If I exit, I'll be...

23 THE REPORTER: He's on twice here.

24 THE COURT: Okay. We're showing from our end that you
25 are on twice, that you have two –

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1 MR. MORRIS: Okay, is that better?

2 THE COURT: Oh, yes.

3 MR. MORRIS: Perfect, we're all set.

4 THE COURT: There we go. Okay, so let's get your
5 appearance on the record.

6 MR. MORRIS: Anything – that I fixed that problem.
7 Good morning, Your Honor. John Morris, Pachulski, Stang, Ziehl
8 and Jones for Highland Capital Management. There are three
9 matters on for today's hearing which I'll discuss more fully
10 after I make my appearance. I just wanted to note that I will
11 argue the plaintiff's motion to strike and for sanctions. I'm
12 presuming that we go in this order.

13 My colleague Hayley Winograd will argue the
14 defendant's motion to strike and then I will return to argue
15 plaintiff's motion for partial summary judgment. So you'll hear
16 from me today on two of the three motions and you'll hear from
17 Ms. Winograd on the third motion.

18 THE COURT: All right. Thank you.

19 Now for, I guess, the pleadings call them the
20 agreement or the alleged agreement defendants. Maybe we have
21 multiple attorneys appearing for them. So I'll hear – well,
22 first for James Dondero, who do we have appearing?

23 MR. TAYLOR: Good morning. Clay Taylor on behalf of
24 Mr. Dondero. However, arguing the motions that are to be heard
25 today will be the Stinson law firm, and I will defer to them, to

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1 which individuals are going to be arguing which motions.

2 THE COURT: Okay. Thank you.

3 All right. Hopefully people could hear. Mr. Taylor
4 appeared for Mr. Dondero here in the courtroom, but he said the
5 Stinson law firm will be making arguments.

6 So who do we have appearing for which defendants at
7 the Stinson law firm?

8 THE REPORTER: She's on mute, Judge.

9 THE COURT: You're on mute.

10 Is that Ms. Deitsch-Perez?

11 THE REPORTER: Yes.

12 MS. DEITSCH-PEREZ: Yes, it is. I'm sorry. Can you –
13 can you hear me now?

14 THE COURT: Now I can. Thank you.

15 MS. DEITSCH-PEREZ: Okay. Good morning. This is
16 Deborah Deitsch-Perez from Stinson and we will be arguing on
17 behalf of Mr. Dondero, on behalf of HCRE and HCMS, although we
18 will briefly also cover, just for the sake of coherence in the
19 argument – the arguments that are being made with respect to the
20 term loan slightly, although that will largely be covered by Mr.
21 Rukavina, who will be arguing on behalf of NexPoint and HCMFA.

22 On our side, I will be arguing the motion for summary
23 judgment. Mr. Root, Jeremy Root, another of my partners, will
24 be arguing the debtor's motion for contempt and sanctions and to
25 strike. And Mr. Aigen will be arguing the defendant's motion to

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1 strike the Klos declaration that included evidence for the first
2 time in the debtor's reply brief.

3 THE COURT: Okay. Thank you.

4 MS. DEITSCH-PEREZ: But I will leave Mr. Rukavina to
5 introduce himself.

6 THE COURT: All right. Mr. Rukavina, are you out
7 there?

8 MR. RUKAVINA: Yes, Your Honor. Good morning. Davor
9 Rukavina and Julian Vasek. Can the Court hear me?

10 THE COURT: Yes.

11 MR. RUKAVINA: Your Honor, I'll be handling all
12 matters related to HCMFA and all matters related to NexPoint
13 except the joint issue regarding the alleged agreement.

14 I also, Your Honor, would suggest that we not take
15 these matters piecemeal. I would suggest that debtor present
16 its arguments and evidence on all motions and then the
17 defendants respond at once. That's how Ms. Deitsch-Perez and I
18 at least have prepared our presentations.

19 THE COURT: All right. First, are there any more
20 lawyer appearances?

21 All right. Well, let's – let's talk about the
22 sequence and time allotments for arguments. I know there were
23 emails, I think last Thursday, among counsel and my Courtroom
24 Deputy. And I just assumed we were going to break these up from
25 the emails, but I don't feel strongly about it.

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1 Let me — I'm going to start with Mr. Morris.

2 MR. MORRIS: If I'm —

3 THE COURT: Mr. Morris, I mean as plaintiff, it's
4 appropriate to start with you. What I thought I had signed off
5 on last Thursday afternoon was that each side would have two
6 hours for the motions for summary judgment. And what I mean,
7 you know, the defendants collectively would have two hours and
8 the plaintiff would have two hours, with plaintiff reserving
9 some of their two hours for rebuttal. But then I thought we
10 were carving up where the plaintiff's motion to strike, there
11 will be 30 minutes each, and then the defendants' motions to
12 strike, there would be 15 minutes each. So I kind of have in my
13 brain coming out here that we were going to take it piecemeal,
14 as Mr. Rukavina said.

15 Mr. Morris, what would you like to say about that?

16 MR. MORRIS: That's exactly my expectation and not
17 only is that the sole communications with the Court, I've never
18 heard of the concept that's being raised now for the first time.
19 Not only was that my understanding, not only was that the
20 presentation that was made to the Court to limit the time for
21 each of the three motions, but I don't understand how you can
22 possibly do this in the way that's being proposed. I think you
23 need to resolve the two motions to strike before we can get to
24 the summary judgment motions, because the determination on each
25 of those motions is going to impact the scope of the summary

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1 judgment argument. I just don't see how you can do it all at
2 once. It will again allow them to inject into the summary
3 judgment motion the very evidence that I'm seeking to exclude.
4 I object.

5 MR. RUKAVINA: Your Honor, I would respectfully – Mr.
6 Morris is right, that was our understanding, but part of that
7 understanding was that the summary judgment motions would
8 proceed first. I think that the Court can easily conclude,
9 whether at the beginning or the end or under advisement, that
10 certain evidence ought to be stricken or ought not to be
11 stricken. Of course we'll proceed however the Court wants to
12 proceed, but I will just respectfully suggest that they should –
13 they should argue all their motions at once and we'll argue all
14 our motions at once. But, again, however the Court wants to
15 proceed.

16 THE COURT: Ms. Deitsch-Perez, anything to add on the
17 point?

18 MS. DEITSCH-PEREZ: I don't. We're – I understand
19 each – each person's position. It might be more useful the
20 Court to hear everything together so it's all together in your
21 mind. I also hear Mr. Morris' point that he had a plan and it
22 would disrupt him to vary from the plan. So the defendants are
23 prepared to do as Your Honor likes.

24 THE COURT: Okay. All right. Well, I am going to go
25 with the plan that I thought – I thought you all had adopted. I

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1 thought it was just sort of a question of how many minutes for
2 each. And so what my brain needs to do is hear the motions to
3 strike first. And, you know, that's going to affect what I'm
4 willing to hear people talk about in the motions for summary
5 judgment and responses. So, with that, I will hear the
6 plaintiff's motion to strike first.

7 MR. MORRIS: All right. Thank you, Your Honor.
8 Before I begin the substance of that particular motion, I would
9 just ask Ms. Canty to put up on the screen one demonstrative
10 exhibit. I had — I don't know if you've had a chance to see
11 this Your Honor, but about a half an hour before the scheduled
12 time of the hearing, I circulated to Ms. Ellison and to counsel
13 the demonstrative exhibits that I plan on using. And I think
14 the first one that will just really be helpful for everybody.

15 As Your Honor knows, we submitted yesterday a 22-page
16 agenda for just three motions. And obviously the complexity and
17 the paper that has undoubtedly burdened us all is necessitated
18 by the fact that there's five separate adversary proceedings,
19 even though they cover a host of related topics. So what we did
20 for the convenience of the Court and for the convenience of all
21 parties is try to put in one place kind of a list of where our
22 evidence can be found. And so, in no particular order, I have:
23 The motion for summary judgment; it shows you which docket
24 number in each adversary proceeding our motion can be found; it
25 highlights below that the three places, the three — the three

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1 areas of evidence that we have introduced in support of the
2 motion; Mr. Klos' declaration; there is a separate appendix.
3 And then there's the reply appendix, which I will talk about in
4 our motion in a bit. And, again, you've got all of the docket
5 entries.

6 And I think that it was probably just a mistake that
7 we didn't put the reply appendix in the HCMFA docket, although
8 the reply appendix really doesn't go to HCMFA, so maybe my
9 colleague decided not to file it there because that reply
10 appendix is limited to the Klos declaration, which is the
11 subject of the term note defendants' motion to strike, as well
12 as a stipulation that's independently filed on the docket
13 concerning the admissibility of plaintiff's exhibits.

14 The next item is our motion to strike. It's got my
15 declaration with Exhibits 1 through 9. It's got an errata and
16 it can show where the errata is. And I'll get to that; the
17 errata really is no big deal. It's that we had highlighted a
18 portion incorrectly. And then there is a supplemental Exhibit
19 10 that was also filed in connection with the motion to strike,
20 with the plaintiff's motion to strike.

21 And then you've got defendant's motion to strike. You
22 can see where our opposition and our brief are filed. Those are
23 the docket numbers. And below that is our appendix that we
24 filed in opposition to the defendant's motion to strike, and
25 that's Ms. Winograd's declaration.

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1 So I point this out, Your Honor. I guess we can go to
2 each of these items as the motions come up, but I just wanted
3 the Court to know that we are very cognizant of the difficulty
4 of keeping track of where all of the evidence has been lodged.
5 And I hope — I hope that the Court and counsel find this useful
6 because I don't know that I got it perfect, but I tried my best.
7 And I think it accurately reflects all of the places where our —
8 where our evidence is lodged. So unless the Court has any
9 questions, I'm prepared to proceed on the plaintiff's motion to
10 strike.

11 THE COURT: All right. Thank you for this. If there
12 are no comments about this, I will hear your argument.

13 All right.

14 MR. MORRIS: All right. So, Your Honor, I think that
15 the agreement here is that on this first motion, the plaintiff's
16 motion to strike, each side would have 30 minutes. We're the
17 movant. I don't expect to use all 30 minutes. And whatever
18 time remains, I'm going to just clock myself, I'll just reserve
19 for rebuttal.

20 Your Honor, this motion obviously was not brought
21 lightly. There was a long string of emails that I engaged with
22 with my adversaries before filing the motion. If we could just
23 put up the dec. that's associated with this motion. This motion
24 was necessitated, from our view, because the defendants put into
25 the evidentiary record the Pully report. The Pully report was

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1 the subject of a motion that the defendants made that I'll talk
2 about in a moment that was denied. And HCMFA engaged in
3 extensive discussion about an affirmative defense that they had
4 sought leave to – to plead, and that motion was also denied.

5 And so, as – as the defendants have pointed out, I
6 woke up the next morning and I was really – I was upset and I
7 did write an email and it did say that – I put them on notice
8 about what was happening here because I thought it was
9 completely improper to try to include into the record and to
10 make arguments that had been excluded by a very specific order
11 of the Court.

12 And let's be clear here. The defendants were asking
13 the Court for permission to do something. HCMFA filed their
14 motion for leave. It's lodged at Docket 82 on their docket.
15 And they specific requested, quote: Leave to amend its answer
16 to expressly deny that the notes were signed. The UCC appears
17 to require a more express denial of signature.

18 So there was – there was a purpose to the motion.
19 They wanted permission from the Court to do something and they
20 wanted permission from the Court to do something because they
21 knew that they needed it in order to prove, you know, one of
22 their defenses.

23 I just have to point out that if you go back and you
24 look at that pleading, –

25 (Tones.)

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1 MR. MORRIS: - there's like this six - the six steps
2 of assumptions that - that are - that they argue prove that it
3 was all a mistake. But I just - you know we'll talk about this
4 more on the merits, but this one just jumped out at me. Mr.
5 Dondero never told Mr. Waterhouse that the transfer was a loan,
6 just that the trans- - just to transfer the funds. And I have
7 to tell you that statement, the game is over for HCMFA, because
8 Mr. Dondero told Mr. Waterhouse to transfer the funds. What he
9 didn't tell him, what he didn't tell Mr. Waterhouse, and there
10 will be no dispute about this, is that the transfer was supposed
11 to be compensation. There will be no evidence that Mr. Dondero
12 told Mr. Waterhouse that the transfer would be compensation.
13 This admission in this motion is the end of the game for HCMFA,
14 and we'll talk about that more in a moment. But make no
15 mistake, HCMFA came to this Court and they asked for permission.

16 The term note defendants also came to this Court and
17 they asked for permission. They knew the deadline in the
18 scheduling order had passed or was about to pass. I think they
19 filed on the day that it was going to pass, and they asked this
20 Court for permission. And they said: Please, can you extend
21 the deadline so that I can commission a report and engage in
22 expert discovery. And, -

23 (Tones.)

24 MR. MORRIS: - again, no - no dispute, right, this is
25 their pleading. They requested an extension of the deadline in

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1 the scheduling order so that NexPoint could designate a
2 testifying expert on the standards and duties of care under the
3 shared services agreement. NexPoint wanted to present expert
4 testimony on the question of whether the debtor put their head
5 in the sand, in violation of any affirmative duty or obligation
6 they may have about the matter. They asked the Court for
7 permission.

8 Twice my client invested a meaningful sum of money to
9 pay my firm to defend these motions. Your Honor took the time
10 to hear these motions. We actually had an evidentiary hearing
11 on the motion for leave. I cross-examined Mr. Sauter for two
12 hours on that. We had an extensive argument on the motion to
13 extend the expert discovery deadlines and the expert disclosure
14 deadlines. And following both hearings, the Court entered
15 orders denying the motion.

16 Now from my perspective, the matter was closed. They
17 could not assert the affirmative defense that they asked the
18 Court to assert because they made a motion and they lost. Now I
19 understand, I read in their papers it was all out of an
20 abundance of caution: We don't even think we needed to make it.
21 It's just an element of their case. Nonsense.

22 The fact of the matter is, Your Honor, if you look at
23 the next slide, go back to the spring of 2021, Mr. Sauter did
24 his investigation, they came to Your Honor with the first motion
25 for leave to amend, and Mr. Sauter swore – a lawyer – Mr. Sauter

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1 swore under oath multiple times that Frank Waterhouse signed the
2 notes. And we've highlighted just a few of them here.

3 Paragraph 22: The notes were signed by mistake by
4 Waterhouse without authority from HCMFA. Paragraph 29:
5 Waterhouse was the chief financial officer of both the debtor
6 and HCMFA at the time he signed the notes. 30: Waterhouse made
7 a mistake in preparing and signing the notes. 32: HCMFA now
8 believes that it has affirmative defenses to the notes in the
9 nature of mutual mistake, lack of consideration, and no proper
10 authority of Waterhouse to sign the notes.

11 Now, mind you, this declaration is submitted after Mr.
12 Sauter engages in an investigation to determine the origin of
13 the notes. He interviewed Mr. Waterhouse three times. And at
14 no time did Mr. Waterhouse say, 'I don't know what you're
15 talking about. I don't know where these notes came from.' In
16 fact, we know from the hearing, he said just the opposite. He
17 told Mr. Sauter, although it's not in his declaration, nor was
18 it in his second declaration, he specifically told Mr. Sauter:
19 The notes were prepared for a very specific purpose; they were
20 prepared because the auditors needed them. That was the
21 testimony, so the notion that they had always been doing this or
22 that they were just arguing in the alternative, they never
23 argued in the alternative.

24 This statement right here on the screen is the –

25 (Tones.)

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1 MR. MORRIS: — admission by HCMFA that Mr. Waterhouse
2 signed the notes, and we relied on that admission. Right? That
3 admission right there, this is their words, not mine. It's
4 their lawyer, not ours. It's under oath and it was done for the
5 express purpose of trying to persuade the Court that it should
6 be entitled to amend its pleading, where it had no affirmative
7 defenses previously, to assert this affirmative defense. That's
8 where we were.

9 As soon as I saw what they did and included the Pully
10 report and included extensive argument about the affirmative
11 defense that why had excluded, I immediately wrote to them.
12 And, let's be clear, there's only two possible things that are
13 going on here, only two possible things: One, they wanted to
14 make sure that they preserved their — their position for appeal,
15 okay? No problem with that.

16 The second is that they were trying to get into the
17 record, for appellate purposes, evidence and arguments that had
18 been excluded. And that's where I drew the line. They take
19 issue with my decision not to accept their stipulation, but I
20 don't know what lawyer in the world would have accepted their
21 stipulation. To accept their stipulation would have been to
22 give them what they wanted, and that is not to preserve the
23 issue for appeal but to introduce into evidence for purposes of
24 the record on appeal an expert report that was excluded and an
25 affirmative defense that was excluded.

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1 I did make my own offer to kind of test what their
2 motivations were, and it's in the record, it's in that email.
3 And I specifically said: Look, if your concern is preserving
4 the issue for appeal, I'm happy to stipulate to that. It wasn't
5 much of a give, Your Honor, to be honest with you. Why?
6 Because they appealed both orders. Both orders are subject to
7 appeal, so there can be no argument today that the purpose of
8 including this stuff in the record was to preserve their
9 appellate rights. The appeals have already been made, so what
10 they're trying to do is get into the record now what Your Honor
11 specifically excluded.

12 What do they say in response to our motion? It's
13 pretty simple: It's just a proffer. Proffers are permitted.
14 Proffers are even permitted in summary judgment motions. Your
15 Honor, I will stipulate to both. They should not waste any time
16 trying to convince the Court that proffers are acceptable or
17 that proffers are acceptable in summary judgment motions. What
18 they should be trying to do, what they can't do, is – is argue
19 that a proffer of evidence and arguments that have previously
20 been excluded by Court order can be entered in opposition to
21 summary judgment. No case has ever held that. They don't cite
22 to any case for that, okay. That's why we made our motion,
23 because we think it's patently unfair for them to put this stuff
24 into the record now. And I will say that I took –

25 (Tones.)

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1 MR. MORRIS: - the time to read their cases and their
2 cases actually support us, they don't support them. If you take
3 a look at just two of them, I think the two most important cases
4 are Fusco and Walden (phonetics). And in both cases, they
5 didn't involve summary judgment. They involve motions in
6 limine. And what they basically said is: Look, if you make a
7 proffer in the context of a motion in limine and the proffer is
8 denied, your issue is preserved. And, in fact, the Fusco court
9 specifically said: In many cases the grant of the prior motion
10 in limine - here it was a motion to exclude evidence - would
11 make it improper to call such witnesses without prior
12 permission. All the proponent could do would be to line up the
13 witnesses at trial and then ask permission.

14 The defendants here didn't ask for permission. In
15 fact, they did ask for permission and they were told no. And
16 instead they just put this stuff in the record. And, no matter
17 what I said, they wouldn't back down.

18 I liken this, Your Honor: Parent and child. Bear
19 with me for just a moment. A child comes to a parent and says,
20 'May I have a cookie?' And the parent says - the parent says to
21 the child, 'You can have a cookie after dinner. You can have a
22 cookie during dessert. That's the time to have a cookie.' And
23 they sit down for dinner and they have dinner. Dessert comes.
24 Parent puts the plate of cookies on the table. The child
25 doesn't eat any. Two hours later, -

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1 (Tones.)

2 MR. MORRIS: - the parent is putting the child to bed.
3 And the child says, 'May I have a cookie now?' And the parent
4 says, 'No, the time for having a cookie was at dessert. You
5 knew what the schedule was. You knew what the timing was. You
6 can't have a cookie now. It's too late.'

7 So child goes to bed. Parent takes the child to
8 school the next morning. Parent comes home, goes into the
9 child's room, and there's crumbs everywhere in the bed. Child
10 comes home. Parent says, 'I told you you couldn't have a
11 cookie. What are you doing?' And the child says, 'You told me
12 I couldn't have a cookie, but you didn't tell me I couldn't have
13 the round thing made of dough with chocolate chips.' That is
14 exactly what the defendants are saying here. That's the
15 totality of their response, Your Honor.

16 Their response is that your order denying these
17 motions didn't specifically say that they could proffer
18 evidence. All they said is that they - I'll leave it to them.
19 I'd like to know what they think the orders meant. That somehow
20 we went through that whole process and they could just put into
21 evidence and make arguments about matters that this Court said
22 no. You told them the time for doing all of this has passed.
23 You told them you can't have a cookie, but they ate it anyway.

24 This is substantial prejudice to Highland and it's why
25 - it's why this motion had to be heard before the summary

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1 judgment motion. They want to argue to you now the Pull report
2 even though they know I didn't have a chance to depose Mr.
3 Pully. They want to argue their affirmative defense that they
4 didn't raise even though they made the motion and they lost
5 because they know I didn't have a chance to take any discovery
6 on this type of defense because they had said until they made
7 their motion that Mr. Waterhouse signed the notes by mistake
8 authority (phonetic). That's the case I was trying, until we
9 got this motion.

10 So it would be severely prejudicial, and that's the
11 point. And the interesting thing is, Your Honor, if we could go
12 to the next slide, I just want to conclude by raising a number
13 of questions that I just don't see – unless they answer these
14 questions, I probably won't even have a rebuttal here. Okay,
15 how is it that Highland is worse off having won the motion. If
16 hold didn't oppose the motion, we wouldn't have spent any money,
17 the Court wouldn't have been burdened, and I would have been
18 able to take discovery of Mr. Pully and on the affirmative
19 defense. Had I argued the motion and lost, at least I would
20 have had the opportunity to take discovery. And I would have
21 had the opportunity to take discovery of both Mr. Pully and on
22 this defense. But instead I won the motion, so I'm worse off.
23 And now I'm supposed to deal with the summary judgment argument
24 on evidence and arguments that have been excluded that I haven't
25 taken discovery on it.

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1 I would like to know from the defendants how it is
2 that my position is worse having won the motions. I'd also like
3 to know how come they don't address prejudice at all. How come
4 – and it's not like I haven't raised the issue. If you look at
5 my last email to Mr. Aigen, I had a laundry list of reasons why
6 I thought this was improper. They didn't respond to that at
7 all.

8 In our motion, we gave a laundry list of reasons why
9 we're prejudiced here. They didn't – maybe I missed it. Maybe
10 they'll point out that I missed it. It's possible. But I don't
11 recall seeing anything in any of the papers that said why this
12 is proper and why the prejudice to Highland isn't what I say it
13 is.

14 I'd also like to know if the orders don't prohibit a
15 proffer on summary judgment, what exactly do the orders
16 prohibit? If we didn't move for summary judgment, would the
17 defendants have been permitted to enter the Pully report into
18 evidence and pursue a new defense without having the orders
19 reversed? Think about that.

20 If we didn't make the motion for summary judgment,
21 where would we be left? Would they be able to do what they've
22 done now? How does their position improve because we've made a
23 motion for summary judgment?

24 Number five, if as HCMFA contends it always asserted
25 that Highland didn't sign the notes, – that's a mistake on my

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1 part – if it contends that it always asserted that Highland
2 didn't sign the notes and that HCMFA is only challenging an
3 element of Highland's claim, then why did they make the motion?
4 Why did the burden me and my client and the Court with this
5 motion if there was no need for it?

6 There was a need for it, and just look at paragraph 1
7 of their motion. There was a need for it. They knew there was
8 a need for it. They didn't plead in the alternative. HCMFA
9 will never present a pleading to this Court where they asserted
10 that they didn't sign the note. In fact, Mr. Sauter's sworn
11 representations to you are the exact opposite.

12 And, finally, I just leave them with this question,
13 because I didn't see it in their brief: Identify one case
14 anywhere in the United States of America where a court has
15 permitted a party opposing summary judgment to proffer evidence
16 and pursue defenses that were excluded by very explicit,
17 explicit prior Court orders following full hearings on the
18 merits?

19 Unless Your Honor has any questions, – you know, let
20 me just say my goal in life is not to hold lawyers in contempt
21 of court, my goal in life is not to obtain sanctions, my goal in
22 life is to try cases fairly, and this is not fair. It's just
23 not fair. It's not consistent with any law. And it does
24 violate not just the two orders that Your Honor entered but the
25 scheduling order. And so under Rule 12, under Rule 32, under

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1 the rules of contempt that Your Honor is familiar with, the most
2 important thing to me is to keep this stuff out of the record.

3 At some point people have to be held accountable for
4 this kind of conduct, but I leave that to the Court's
5 discretion. Unless the Court has any questions, I'm going to
6 reserve my 12 minutes for rebuttal.

7 THE COURT: Okay. Thank you.

8 All right. Mr. Rukavina.

9 MR. RUKAVINA: Your Honor, Ms. Deitsch-Perez will
10 handle half of our response and I'll handle the second half.

11 MR. MORRIS: Okay.

12 MS. DEITSCH-PEREZ: It's -

13 MR. RUKAVINA: I apologize. No, I apologize. Not Ms.
14 Deitsch-Perez, her partner.

15 MS. DEITSCH-PEREZ: Okay. Mr. Root will argue.

16 THE COURT: Okay, Mr. Root.

17 MR. ROOT: Thank you, Your Honor. This is my first
18 time having the privilege of appearing before you. Ms.
19 Deitsch-Perez brought me into this case to assist on this motion
20 I think because I am the co-chair of our firm's appellate
21 practice group, and the ways in which arguments are preserved
22 for appeal are important to me professionally and they're
23 important to of course all our firm's clients and I do have a
24 little bit of insight that I have earned from my experience in
25 that area on how these kinds of pitfalls can emerge.

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1 I'm going to address in my argument the portion of the
2 motion that's addressed to the Pully report and Mr. Rukavina is
3 going to address the affirmative defense issue.

4 And, with respect to the Pully report, it's a bit
5 curious to me because the nature of the conduct was clear at all
6 times. It was clear in the filing to the Court. It was clear
7 in discussions with Mr. Morris as to what was being done. The
8 Pully report, - let me see if I can get this PowerPoint up -
9 I'll share it with the Court. I'm not that adept at this and so
10 I hope I've got this right.

11 Can everyone see this?

12 THE COURT: Yes.

13 MR. ROOT: Okay, great. And, you know, one of the
14 things where Mr. Morris began is with the multiplicity of
15 actions here. There are multiple actions with multiple
16 defendants that are adversary proceedings that are
17 postconfirmation in bankruptcy court. And, ultimately, the case
18 - the case is against - these defendants are going to be
19 resolved by a jury trial at the district court. And that's an
20 important distinction to consider as you think through the
21 issues raised by the plaintiff's motion to strike.

22 You know, overall the plaintiff has not proved the
23 defendants or their counsel violated the express terms of any
24 order of this Court. You know, with respect to the Pully
25 report, there is no burden to the plaintiff or this Court from

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1 the use of a proffer. And the rules that plaintiff relies upon
2 do not authorize their motion to strike, sanctions, or a finding
3 of contempt.

4 Neither the order denying the extension of the expert
5 witness deadline nor their order denying assertion of
6 affirmative defense, the Court should make any ruling on
7 admissibility of evidence at trial or for summary judgment.
8 This Court's order did not expressly bar the defendants from
9 offering the Pully report as a proffer to complete the summary
10 judgment record, which ultimately should this Court make a
11 conclusion adverse to either side, I assume there will be
12 objections to the report and recommendation that go to the
13 district court. And, ultimately, the dispositive motions are
14 going to be decided by the district court in the end, not this
15 Court. This Court will make a report and recommendation on the
16 motions that are heard today, but under the divisions of
17 jurisdictions in cases like this, any final decision is subject
18 to review in the district court. And that's important because
19 the presence or absence of materials or arguments in the summary
20 judgment record will matter to the completeness of the record at
21 the district court.

22 Before I show you the precise conduct with regard to
23 the Pully report that's alleged to be in violation, I want to
24 make sure we all are oriented correctly to the standards in the
25 Fifth Circuit for contempt. When a lawyer seeks contempt from a

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1 court against other lawyers and other parties, it's a very
2 serious thing to do. And it's only warranted when someone
3 violates an order of a court requiring specific and definite
4 language that person do or refrain from doing an act. That
5 hasn't happened here.

6 The orders here denied leave to amend the complaint to
7 add a new or a different affirmative defense and they denied the
8 extension of the date for expert designations in the case. They
9 did not expressly prohibit a proffer for the purposes of
10 preserving the evidence on appeal, which are important purposes.

11 And so let's look at exactly what the defendants did
12 with are Pully report. There is one footnote and it is present
13 in the appendix and this is it, right here, footnote 76. It
14 says: Defendants' position is bolstered by the expert report of
15 Steven J. Pully, which was incorrectly not permitted to be
16 included in the record by the Court. Defendants submit this
17 proffer to preserve their objection.

18 That's it. That's the completeness of the reliance
19 upon the Pully report, the argument really to the Pully report.
20 And right here it expressly acknowledges the Court's order and
21 shows the intention of the defendants to respect the Court's
22 order with which they disagree; that we – they have filed an
23 appeal to the district court. And what plaintiff advised the
24 Court about the appeal in his argument, he did not mention that
25 in his response to the appeal he says the appeal is improper and

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1 should not be heard by the district court. Well, then we're
2 back here in the soup. Because if that appeal is improper and
3 we need to do something different to preserve our objections to
4 the exclusion of the Pully report, this is exactly what we've
5 done. We've put it into the record and made this one footnote
6 reference. And that's the only thing that's been done with
7 respect to the Pully report.

8 And after – after that, Mr. Morris was upset, as he's
9 candidly admitted, and he demanded that the report and the
10 footnote be withdrawn by January 25th or face sanctions. And,
11 you know, we advised him in our email about this was – we
12 explicitly stated in our response that the expert order was
13 denied and the evidence was being offered as part of an offer of
14 proof. And we asked him for authority stating that providing
15 such an offer of proof is improper or could be subject to
16 contempt. He offered no authority, he responded quickly, and he
17 demanded lateral compliance with – with his demands. Either
18 comply with the demands or you won't, they don't need any
19 further response.

20 Well, we didn't think that was adequate or sufficient
21 exchange of information among counsel on a subject as serious as
22 contempt. And so the next day we wrote him back and offered
23 extensive authority regarding offers of proof, including the
24 cases he cites to Your Honor.

25 You know, the – as you know, offers of proof are

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1 typically used to permit the trial judge to reevaluate his
2 decision in light of the evidence to be offered and to permit
3 the reviewing court to determine to the exclusion of effective
4 and substantial rights of the party offering it. That's Fortune
5 Auto from the Second Circuit in 1972, "A proffer of evidence may
6 be required if the trial judge is not well aware of the content
7 and purpose of the evidence." Or the Tenth Circuit in the
8 Fevrick (phonetic) case. "The court must be well aware of the
9 substance of the evidence and the record must reflect the
10 substance of the evidence," that's the Sheffield (phonetic) case
11 from the Eleventh Circuit.

12 And the Fifth Circuit, again in Maquay (phonetic),
13 "The proponent must show the substance of the proposed evidence
14 and make known to the court for whatever reasons the evidence is
15 offered." And on and on. Ample authority that this is exactly
16 what we should be doing, particularly here where this summary
17 judgment record is going to go to the district court on appeal,
18 or there – and if that happens, the district court needs to have
19 a complete record. And the complete record, from our
20 perspective, should include the Pully report.

21 We acknowledge the Court's prior ruling with respect
22 to the Pully report. We acknowledged it in the filing that the
23 plaintiff says is contemptuous and before that all of this
24 authority supports the decision that we made to include it in
25 the record in the minimal way that we've done.

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1 But we did more. We offered to stipulate, and here is
2 an excerpt, the first excerpt from the stipulation, we offered
3 to stipulate the bankruptcy court may disregard the Pully
4 material in the opposition and consideration the opposition as
5 if it did not contain any references to the Pully material until
6 and also the deadline order is modified to allow the Pully
7 report to be used by defendants.

8 That solves entirely his prejudice concerns with
9 respect to the Pully report. Enter the stipulation, we file it
10 with this Court, the Court disregards the Pully report, and we
11 move on. And we have completed our record for appeal.

12 And that was the other thing that we asked for in the
13 stipulation: Can we please agree that we preserved our
14 objections, that we properly preserved any objections that we
15 may have to the expert deadline order and that we properly
16 preserved any objection to the exclusion of the Pully report.
17 That's what we're – that's what we're after. That was our goal
18 throughout.

19 In response to this stipulation, the plaintiff says:
20 Oh, if your issue is preserving the issue for appeal, I'd
21 consider a stipulation. And if you're truly concerned with
22 reserving your right, I'll consider a stipulation.

23 But we sent him a stipulation that we thought was
24 appropriate and complete and necessary. And that should have
25 been the end of the matter. And we sent it to him the same day,

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1 we said, you know, this is an offer of proof, please let us know
2 if you have comments on the stipulation, and let's move forward.
3 No prejudice, no consideration of the Pully report. Our
4 objections are preserved.

5 And he says this is havoc, and endless questions, and
6 we are insisting on ignoring Your Honor's orders. That is just
7 not true. Throughout this correspondence we acknowledge this
8 Court's order. And we're doing what we believe to be necessary
9 to preserve the objections.

10 And it's the plaintiff's motion that's created this
11 needless burden this morning. It manufactures expenses for
12 which to seek sanctions. We offered to stipulate, as you've
13 seen, that the Court could disregard the Pully report. And even
14 in the absence of a stipulation, the Court may disregard the
15 proffer and say, 'I'm not including it. You've – my order was
16 the Pully report was untimely.' And there's just no authority
17 anywhere to impose sanctions arising from circumstances like
18 this.

19 I'm not going to into how the proffer was appropriate.
20 In fact, Mr. Morris has admitted that the proffer is an
21 appropriate way to do this. He just doesn't believe that's what
22 we're doing. Well, the evidence is to contrary. That's all we
23 were doing. The Fusco (phonetic) case, which he relies upon,
24 does not support their position. An adequate and complete
25 pretrial proffer will preserve the record.

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1 In this case, with the multiplicity of matters, where
2 the Pully report was only informally injected into one of them,
3 in order to make sure the district court had a complete record,
4 we included the Pully report in the appendix. That's what we
5 did. That's why we did it. And, you know, anything otherwise
6 is just contrary to the evidence and the facts.

7 Rule 37 just addresses failures to make disclosures or
8 cooperate in discovery; those matters are not at issue here.
9 And we acknowledge this Court's order and are willing to abide
10 by it and have offered to stipulate in a way that is clear and
11 would remove all prejudice from the defendants.

12 And if this Court were to strike the record, we – it
13 would needlessly complicate the record on appeal. I have dealt
14 with this situation where in an appellate context a motion to
15 strike below is granted and the evidence that was stricken was
16 sought to be, you know, advanced as part of the argument about
17 the motion to strike, and often my adversaries will say, no, you
18 can't include that stricken evidence in the appendix because the
19 district court struck the evidence and, therefore, it shouldn't
20 be part of the record on appeal. We're trying to avoid those
21 kinds of fights. There are enough disputes in this matter. And
22 the easiest and best way to do this is to deny the motion for
23 sanctions and move forward to the merits.

24 The Pully report merely completes the record. And at
25 this point I'm going to pass, unless the Court has questions, to

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1 Mr. Rukavina to address the affirmative defense issues.

2 THE COURT: Okay. Here – here is my question and it
3 goes to Mr. Morris' point that he's worse off for having won the
4 motion to extend time to file the Pully report. So let me give
5 you a hypo and you tell me if I'm wrong in thinking this is a
6 scenario that could play out. So –

7 MR. ROOT: Sure.

8 THE COURT: – let's assume I deny the motion to
9 strike, okay, and it gets in the record for the limited purpose
10 of, you know, preserving it for appeal. And let's also assume I
11 end up making a report and recommendation to the district court
12 that it grant the motion for a partial summary judgment.

13 And, then meanwhile, while that's sitting out there on
14 the district judge's bench or desk, the district court reverses
15 my earlier decision to extend the deadline – I should have
16 extended, I should have let the Pully report come in. Then the
17 district court later gets off its desk my report and
18 recommendation, and it considers the Pully report, okay, because
19 it's reversed my earlier decision. Isn't it true that the
20 plaintiff never would have gotten its chance to take discovery
21 and maybe present refuting evidence on the motion for summary
22 judgment?

23 MR. ROOT: Yes. So in the hypothetical, Judge
24 Jernigan, I think it's really where – where I know that
25 plaintiff will have their opportunity is in the context of the

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1 briefing around the objections to a recommendation on summary
2 judgment. I am confident Mr. Morris would advise the district
3 court, 'If you are going to consider the Pully report, I need an
4 opportunity to take more evidence,' which could happen. If the
5 district court – you know if the district court concludes Your
6 Honor was incorrect on the extension of the deadline with
7 respect to this report, I don't want to prejudge what will need
8 to happen next, but a natural thing to happen next would be to
9 provide Mr. Morris an opportunity to take a deposition of Mr.
10 Pully and develop any kind of rebuttal evidence that he thought
11 was necessary.

12 I don't know what all that's – you know, I don't – I
13 don't know what path that's going to take. I can't prejudge, I
14 don't know. And where we are right now is, is it possible the
15 district court relies on the Pully report and the summary
16 judgment record? Hypothetically, yes. But I just know, from
17 even my short time on the case, that Mr. Morris will object
18 strenuously to that. And – and, from our side, we would not
19 object to Mr. Morris taking discovery – taking expert discovery
20 on the Pully report. Where we are right now, the Pully report
21 shouldn't be considered, we acknowledge that. That's Your
22 Honor's order which we disagree with but respect. But in order
23 to complete the record on this summary judgment motion, we have
24 included it. In the event that as this case progresses and the
25 various appeals progress, allow for it to be considered. And

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1 whether and when that happens and the circumstances and
2 opportunities that will generate for Mr. Morris are as yet
3 unknown.

4 THE COURT: All right.

5 MR. ROOT: But that's where we are. And I don't think
6 he's worse off from us including it in the record because we
7 have admitted to the Court and to him that it need not be
8 considered as part of the summary judgment in this proceeding in
9 front of Your Honor.

10 MS. DEITSCH-PEREZ: And, Your Honor, if it helps, we
11 would represent that if Mr. Morris – if the district court did
12 as Your Honor hypothesized, we would not object to Mr. Morris
13 taking Mr. Pully's deposition and we would not object if Mr.
14 Morris thereafter said we need to get a rebuttal expert, and
15 then we would take rebuttal expert's deposition, and it would
16 all be included, so we would stand by that. Thank you.

17 THE COURT: All right. Mr. Rukavina.

18 MR. RUKAVINA: Thank you, Your Honor.

19 Mr. Vasek, if you will please pull up my PowerPoint.

20 So the facts and circumstances of the failure to sign
21 is a little bit different.

22 Mr. Vasek, the first page, please. Scroll down now to
23 the next page and the next page.

24 So the time line here, Your Honor, is important. And
25 I know that the Court prepares her own time line, so we can

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1 ignore the top half. That goes to the merits.

2 But on January 22nd, Highland filed its complaint.
3 Marc 1, we answer. May 22, we file a motion for leave to assert
4 a mutual mistake and that Mr. Waterhouse was not authorized to
5 sign the notes. Now that's important because the Court granted
6 that motion for leave, and we ended up on July 6 filing our
7 amended answer. Your Honor has that amended answer at Docket
8 48. Twice in there, we expressly state the defendant did not
9 authorize Waterhouse to sign the notes or to bind the defendant.

10 So – so that's – so that was our live pleading, that
11 the defendant did not authorize Waterhouse to sign the note.
12 This is – this is important because now we have to
13 cross-reference to the UCC. And, Your Honor, we briefed the
14 UCC, it's on page 11 of my opposition brief. And the UCC says:
15 If the validity of a signature is denied in the pleading, the
16 burden of establishing validity is on the person claiming
17 validity, but the signature is presumed to be authentic.

18 So this now put me in a very interesting position, and
19 there is no case law on this. We clearly denied the validity of
20 the signature. We said Waterhouse wasn't authorized, he wasn't
21 our representative. He didn't have any authority to sign it.
22 But we did not deny the fact of his signature because, as Mr.
23 Morris pointed out our prior investigation, Mr. Sauter asked Mr.
24 Waterhouse and Mr. Waterhouse just flippantly said, 'Well, if
25 it's got my signature, it's my signature.'

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1 So – so going back to the time line, on May 28th we
2 serve our requests for production and on June the 28th, Highland
3 responds.

4 Mr. Vasek, if you will please pull up the – the
5 appropriate RFP.

6 So you see, Your Honor, there on number 9 we ask for
7 all Microsoft Word copies of the notes, including meta data. So
8 the debtor first objects to the term meta data as vague, which I
9 find inconceivable that a trial lawyer wouldn't know what that
10 means, but then it says: Subject to the objection, to debtor
11 will conduct a reasonable search for and produce responsive
12 documents.

13 So that's the response that I get. And I'm now led to
14 believe from this response that they're going to look for the
15 originals and they'll produce the originals, maybe not meta
16 data, but they will produce the originals.

17 If we go back to the time line, Mr. Vasek, please.

18 Months go by, Your Honor, and the debtor does not
19 produce the originals. I ask about it a couple of times and I
20 get no real response. On October the 19th, as we are deposing
21 Mr. Waterhouse, the man who purportedly signed the notes, Ms.
22 Deitsch-Perez expressly asked Mr. Morris, "Are you going to
23 produce the originals," and he says no, doesn't give any
24 response or reasoning. He says no.

25 After that, Mr. Morris and I have a few discussions

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1 and the debtor does agree to produce the originals. They're
2 produced on October the 25th, right before I depose Ms. Hendrix
3 (phonetic). At that point in time, it became clear that Mr.
4 Waterhouse did not sign the notes. That is a fact. Ms. Hendrix
5 took copied images, JPGs of his signature and she affixed them
6 to the notes. Maybe Mr. Waterhouse authorized it, maybe he
7 didn't, there's conflicting evidence on that, but the simple
8 fact is that Mr. Waterhouse did not sign those notes.

9 We promptly file our second motion to amend and this
10 Court denies the second motion to amend. I will admit that I
11 was surprised that the Court seemed not to take any issue with
12 the discovery gains or at least what I thought was a discovery
13 gain, especially when Mr. Morris' response was, 'Well, Mr.
14 Rukavina, you could have issued a new – should have moved to
15 compel me.' But the Court denied the motion.

16 Go to the next slide, please. And go to the next
17 slide, please. And go to the next slide, please. And go to the
18 next slide. And to the next slide.

19 Okay. So – so where are we now? We know as a fact
20 that Waterhouse did not sign the notes. We know that – that we
21 would have known this earlier had the debtor produced the
22 originals.

23 I'd also like to remind Your Honor respectfully that
24 when we were discussing reference withdrawal, I argued both
25 before this Court and the district court that the reference

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1 should be withdrawn immediately to avoid a bifurcated
2 proceeding, to avoid a procedurally-confusing proceeding where I
3 really have two courts now addressing the same issues.

4 When we filed the second motion to admit, we did not
5 admit that leave was necessary. In fact, we expressly pointed
6 out that the UCC is confusing and we filed a second motion for
7 leave out of an abundance of caution. Also very important, no
8 court has ruled whether the failure to sign is an affirmative
9 defense or not. This Court did not address that issue or rule
10 on it when it denied my Rule 15 motion and the district court
11 hasn't ruled on it. And, honestly, there is no case law on
12 that. But we do know that Texas law permits the general denial,
13 so I believe that the correct way to harmonize is that the
14 failure to sign is not an affirmative defense, but it needs to
15 be denied or, rather, the validity needs to be denied in that
16 UCC section that we mentioned.

17 So now we have the summary judgment motion. We have
18 no definitive ruling on whether my defense is an affirmative
19 defense or not. And – and in my response, I expressly state, I
20 expressly referenced this Court's prior denial of the Rule 15
21 motion. I'm not trying to hide it. In the meantime, on or
22 about January the 23rd, we filed not an appeal with Judge Starr
23 but a motion to reconsider, because, pursuant to the rules
24 governing magistrates, which this Court has said she's acting as
25 a magistrate, you have 14 days to move the district court to

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1 reconsider. So that's all that we did.

2 But I think most importantly, Highland itself in its
3 motion raised the signature issue. This is from their own
4 brief. Highland states that Highland must establish that the
5 nonmovant signed the note. Highland raised that issue. And
6 Highland introduced evidence, which I submit is false evidence,
7 that my client signed the notes. It's in our brief, but
8 Highland's - Highland's motion and brief state that the demand
9 notes are valid, signed by HCMFA, and they reference Mr. Klos'
10 declaration. Mr. Klos' declaration begins with, "This
11 declaration is based on my personal knowledge."

12 Next slide, please, Mr. Vasek.

13 But at deposition, Mr. Klos said, "I asked Ms. Hendrix
14 to prepare a note." I asked him, "Did you have anything more to
15 do with papering, preparation, or execution," and he says, "Not
16 that I can remember."

17 I ask him, "Would you have had any role in either or
18 both of the notes actually being signed by ink or
19 electronically," he says, "Likely not, no."

20 So where is his personal knowledge from? So, Your
21 Honor, the facts here - this is an unfortunate motion, it's
22 unfortunate that I'm facing contempt for the first time ever in
23 my life because all I told was the truth, that Mr. Waterhouse
24 didn't sign the note. Highland seeks contempt over something
25 that it - that is its fault because it did not timely produce

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1 documents. Highland seeks contempt over something that it
2 raised in its motion for summary judgment, based on what I
3 suggest is false or misleading evidence. And Highland seeks
4 contempt when all I'm trying to do is preserve my client's
5 rights before the district court, because what has to be
6 remembered is that my only remedy after this Court issues a
7 report and recommendation is to object. I cannot introduce new
8 facts. I cannot file a motion for de novo – or, I'm sorry – a
9 motion to reopen the record. All I can do object. So if I do
10 not respond to something that Highland raises, then my client is
11 prejudiced. Yet we have absolute facts that Mr. Waterhouse
12 didn't sign the notes.

13 Go to the next slide, please.

14 So, in conclusion, Your Honor, on the contempt issue,
15 as a matter of law, no order prohibited me from making this
16 argument or presenting any evidence. The denial of the Rule 15
17 motion was just that, a denial of the motion. There is no
18 specific order requiring my client or me to perform or refrain
19 from performing in a particular way. Nor did I violate the
20 spirit of that order. It is absolutely easy and cheap for this
21 Court to now report and recommend that this was an affirmative
22 defense that was waived by the failure to timely assert it.
23 This does not require complicated briefing. This Court can
24 recommend how it wants to go the district court. There's no
25 prejudice.

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1 Mr. Morris' representations about discovery, it's
2 patently false. Mr. Waterhouse was deposed. Ms. Hendrix were
3 deposed. We all asked them questions on these issues. There is
4 no need to redepose them again, but if they want to redepose
5 them again, fine, I'll pay for it. So there's no – there is no
6 prejudice by a lack of discovery. And, again, they caused this
7 issue by not producing the original notes.

8 Rule 12 and 37 don't apply, just as Mr. Root stated.
9 I also submit that the Court does not have core jurisdiction
10 over contempt. And I believe Your Honor should not strike these
11 arguments and strike this evidence because the Court cannot
12 decide what the district court gets to hear and gets to
13 consider. That is a constitutional problem. All that this
14 Court can do is report and recommend. And if the Court finds it
15 appropriate to report and recommend that this defense should not
16 be considered because it's an affirmative defense that was
17 waived, then that is Your Honor's decision, but I will still
18 then have my right to raise the issue and argue it in front of
19 the district court, which will ultimately decide these issues.

20 So, Your Honor, I think respectfully in the last 20
21 years or so, our practice has become much more bitter – you can
22 close this, Mr. Vasek – it's become much more adversarial, and
23 there is just no need for it, in what is a cold promissory note
24 case, we gave – we offered stipulations, we offered to preserve
25 everyone's rights, and I cannot believe that I am now looking at

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1 contempt, as is my client, because all that we did was to tell
2 the truth in response to Highland's own allegation. Thank you.

3 THE COURT: All right. Rebuttal, Mr. Morris. You've
4 got 12 minutes.

5 MR. MORRIS: I do. Let me just take a moment to set
6 my clock.

7 Interestingly, Your Honor, I don't believe that they
8 answered any of the questions that I posed, but I'm going to
9 respond nevertheless.

10 Mr. Root, nice to meet you. Welcome to Highland.

11 I just want to respond to a couple of comments that he
12 made. He raised the issue of a jury trial. Obviously that's
13 irrelevant here. This is a motion for summary judgment. Your
14 Honor is going to make a report and recommendation. It's going
15 to go to the district court and the district court is going to
16 decide the issue. So this is not about a jury trial, this is
17 about a bench trial, until we get to the jury.

18 Number two, you know both he and Mr. Rukavina dance
19 around your orders and what the motions were about. They're
20 telling you that you didn't tell them that they couldn't have
21 that round thing made of dough with chocolate chips, you just
22 told them that they couldn't have a cookie. I don't get it.
23 For the life of me, I don't get it.

24 With all due respect to Mr. Root, we know well how
25 serious contempt motions are.

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1 (Tones.)

2 MR. MORRIS: We've had a couple of them here. We
3 briefed them extensively. The Court is intimately familiar with
4 the standards for contempt. There was an order, they knew about
5 the order, and they breached it. It's really not more
6 complicated than that.

7 He tries to minimize, Mr. Root tried to minimize what
8 they've done here, but it goes back to what I said in the
9 beginning, and that is there could only be two reasons for doing
10 this. One is because you wanted to preserve the appellate right
11 and the other is to sneak this into evidence for purposes of the
12 record. And he basically admitted that's what they're trying to
13 do. He pointed to footnote 76, he put it up on the screen. And
14 he said, 'Gosh, all we did was say, you know, there's something
15 on there. We didn't even make any arguments.' They don't care
16 about you, Your Honor. They don't care about this proceeding.
17 Their eyes are on Judge Starr in the district court, and what
18 they want to be able to do is get this into the record now so
19 they can make their arguments then, and that's the prejudice.

20 The notion that somehow they're graciously willing to
21 give me the opportunity to do discovery later on, that was what
22 their motion was about. Their motion was to extend an order of
23 this Court to allow them to participate in expert discovery.
24 They made their motion and they lost, and now they say the
25 remedy is to just do what they were told they can't do. Round

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1 thing made of dough with chocolate chips, but then a cookie.

2 The stipulation. Mr. Root spent a lot of time on the
3 stipulation. Again, I would have been perfectly fine, and I'm
4 willing to do it right now, if they withdraw the Pully report –
5 and let me be clear – if they withdraw the Pully report and the
6 arguments related to the barred defense, I will stipulate right
7 now on the record that those issues are preserved for appeal,
8 because they presented them to Your Honor, they asked Your Honor
9 to do something, they made a motion, they asked Your Honor,
10 'Please make a ruling,' now they say it's somehow
11 unconstitutional. Nobody forced them to do it, what they chose
12 to do. And Your Honor entered rulings. And now somehow,
13 because I wouldn't agree to do what they couldn't get you to
14 allow them to do, I'm the bad guy. Again, my offer remains: If
15 the issue is preservation of appeal, withdraw the Pully report,
16 withdraw the affirmative defense, and I stipulate those issues
17 are preserved for appeal. They are already subject of appeal.
18 There's a mention of it's not an appeal, it's a motion for
19 reconsideration. In my life I've never heard of a motion for
20 reconsideration being made in any court other than the court
21 that issued the order. But, be that as it may, it is what it
22 is. That's Mr. Root.

23 Mr. Rukavina spent most of his time arguing yet again
24 the merits. He said that Mr. – Mr. Waterhouse flippantly said
25 that he signed the notes. I don't want to spend too much time

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1 on the merits, Your Honor, but remember Mr. Sauter's
2 cross-examination on this very motion. Mr. Waterhouse didn't
3 flippantly say anything. What he did is he told Mr. Sauter in
4 very clear and unequivocal terms that he knew about the notes
5 and that the notes were prepared for a very specific purpose.
6 That's not flippant. It wasn't disclosed to you, but it
7 certainly wasn't flippant on Mr. Waterhouse's side.

8 And remember, because Mr. Waterhouse has never denied
9 the existence of the notes, I don't know why they're pressuring
10 Mr. Waterhouse like this. It's sad to me. But they are
11 destroying the man. And why are they destroying the man?
12 Because if they're right and this note was somehow done without
13 Frank's authority, then – then Mr. Waterhouse and Mr. Dondero,
14 by the way, made enormous and grievous mistakes in their
15 representations to the auditors in the dozens of filings in this
16 bankruptcy case that the creditors committee relied upon. Mr.
17 Waterhouse prepared every single monthly operating report. So
18 Mr. Waterhouse didn't just make a mistake with respect to these
19 notes, he made dozens of mistakes. I – they're putting the guy
20 under – under the bus. That's on them.

21 Mr. Rukavina says that he served a discovery request
22 and we said we'd produce it and that he asked about it a couple
23 of times, the record is clear Mr. Rukavina remained silent for
24 many, many months. Never followed up. And while I admit that
25 upon receiving the first follow-up request in the later half of

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1 October about this matter, I said no. The fact is I produced it
2 within 10 days. I produced everything within 10 days of the
3 follow-up request. It is not the first time in litigation and
4 it's certainly not the first time in this case that follow-up
5 document productions occurred. Within 10 days of the follow-up
6 request, they had everything they wanted.

7 Of course they never answer why they didn't do the
8 investigation in May of 2019, when Mr. Dondero was fully in
9 control, and then the notes are actually described in the
10 audited financial statements, but we'll save that for a bit.

11 And Mr. Rukavina complains that there's two courts.
12 Woe is me. Happens every single day. There's magistrate
13 judges, there's – there's reports and recommendations. Your
14 Honor knows better than I do, better than anybody on this – on
15 this hearing how these matters work. There is nothing unusual
16 about it. They made a motion, they lost, and now they're
17 ignoring it. And for those reasons, Your Honor, we know that
18 this – the Pully report should be stricken, they should not have
19 an opportunity to make arguments in the district court. What
20 they should be able to do and what I will stipulate that they
21 can do is appeal the order.

22 And they can appeal the order. I mean I don't know if
23 the time has passed, frankly, so I don't – I don't want to open
24 the door to something that may have already been closed. But
25 the fact of the matter is they should go to Judge Starr and they

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1 should explain to Judge Starr why you got it wrong. They
2 shouldn't be allowed to make me sit in an absolutely worst place
3 than I would have been had I not opposed the motion or had I
4 lost, because that is where we are. And I don't care how
5 gratuitous they are in saying, 'You could take discovery.' I
6 had that option last fall and they didn't want to do it. They
7 can't force it on me now.

8 Unless Your Honor has any questions, I've got nothing
9 further.

10 THE COURT: Just one. Just refresh my memory. I have
11 the memory of a very lengthy hearing on the Rule 15 motion to
12 amend. And I guess it was the same day the motion to extend
13 time to add Pully as an expert. Mr. Sauter testified – was it
14 Mr. Sauter? I'm thinking –

15 MR. MORRIS: It was – it was Mr. Sauter. I'm sorry to
16 interrupt, Your Honor, but just to be clear.

17 THE COURT: Yeah.

18 MR. MORRIS: Mr. Sauter is the attorney who –

19 THE COURT: Right.

20 MR. MORRIS: – submitted the declaration in connection
21 with the first motion for leave to amend.

22 THE COURT: Okay.

23 MR. MORRIS: The attorney who submitted the
24 declaration in support of the second motion for leave to amend.
25 And I did cross-examine him at length about, among other things,

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1 his conversations with Mr. Waterhouse –

2 THE COURT: Waterhouse.

3 MR. MORRIS: – where I brought out that Mr. Waterhouse
4 specifically told him why the notes were prepared.

5 THE COURT: Okay. But that's what I thought I
6 remember –

7 MR. ROOT: Just to –

8 THE COURT: – but what I wanted to clarify, Waterhouse
9 was not a witness that day. He –

10 MR. MORRIS: Correct.

11 THE COURT: – he didn't submit a declaration at any
12 time in connection with this litigation, correct?

13 MR. MORRIS: The only statement that we have from Mr.
14 Waterhouse is the singular deposition.

15 THE COURT: Okay. All right. Was someone else
16 wanting to respond –

17 MR. ROOT: And, just to be clear, –

18 THE COURT: Um-hum.

19 MR. ROOT: – and, just to be clear, Your Honor, at the
20 – I believe the transcript on the motion to extend the expert
21 discovery deadline, and there were no witnesses at that hearing,
22 it was a separate hearing.

23 THE COURT: Okay.

24 MR. RUKAVINA: Yeah, agreed. Mr. Root is correct,
25 Your Honor, the hearings were maybe a month apart.

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1 THE COURT: Okay.

2 MR. RUKAVINA: And I just want to refresh Your Honor's
3 memory, if I may refresh Your Honor's memory that at the
4 beginning of the Rule 15 hearing I had argued that under the
5 Local Rules that live testimony was inappropriate and that we
6 were limited to our respective appendices, Your Honor overruled
7 that objection. Otherwise Mr. Waterhouse would have been
8 subpoenaed to be there.

9 MR. MORRIS: Your Honor, I -

10 THE COURT: Say again.

11 MR. MORRIS: - I just -

12 THE COURT: You - you did not want witnesses -

13 MR. MORRIS: - just -

14 THE COURT: I said, yes, witnesses were allowed. And
15 then you say you would have subpoenaed him if you knew how I was
16 going to rule; is that what I just heard?

17 MR. RUKAVINA: No, Your Honor. No, Your Honor, that's
18 - that's - I didn't know how Your Honor was going to rule. We
19 have the transcript if the Court questions my memory. I had
20 argued that under the Local Rules and our practices, when you
21 have an adversary proceeding in the motion, that you are
22 limited, both sides are limited to the evidence in their
23 appendices. Mr. Morris disagreed with that. He had subpoenaed
24 Mr. Sauter. And the Court said, no, you're allowed to call
25 witnesses at this hearing.

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1 What I'm telling Your Honor is if I had known that it
2 was going to be a live hearing with live witnesses, instead of
3 relying on what I thought was the Local Rule, then we would have
4 subpoenaed Mr. Waterhouse. He was not there because we're
5 trying to hide him or anyone is trying to him.

6 MR. MORRIS: Your Honor, just to be very clear as to
7 what happened, I didn't - I served a subpoena on the person who
8 submitted a declaration in support of the motion. I didn't call
9 any other witnesses, okay, so and I think that that was the
10 substance of Your Honor's ruling, was that if you - if you want
11 to submit a declaration, you have to put - you know when
12 somebody wants to cross-examine, you have to be able to do that.
13 And that's all I did.

14 THE COURT: Okay. All right. Well, I'm going to
15 grant the motion to strike, but I am going to deny a request to
16 issue a contempt order or to impose any sanctions. I find the
17 latter somewhat of a close call, I will tell you all. But if
18 it's a close call on something as serious as contempt or
19 sanctions, I think the better exercise of discretion is not to
20 order contempt or sanctions. And let me be clear about a couple
21 of things.

22 I feel like what we have had here has sounded a whole
23 lot like the defendants rearguing motions that I've earlier
24 denied. You know as I recall, and it's been a few weeks, with
25 regard to the Steven Pully report, you know I had no doubt about

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1 his stellar credentials or anything like that, I simply thought
2 not only was it too late in the game but this was not a proper
3 subject matter for expert testimony as I understood the nature
4 of what he was potentially going to be added for. And I do
5 agree very much with Mr. Morris' argument that he's worse off
6 than had he not won the motion earlier, because it will be there
7 in the record and maybe he won't end up having a chance to
8 depose or put on his own refuting evidence.

9 You know I gave one hypo, and the defendant lawyer
10 said, oh, we would agree, you know, to reopen discovery or
11 whatnot. You know I'm also worried about a district court staff
12 who has stacks and stacks of papers who, just like I and my
13 staff, sometimes have troubling keeping up with what's in the
14 record and what's not. You know they may look at it
15 inadvertently in the scenario that they deny the motion for
16 reconsideration that has been filed by the defendant. So this
17 must be stricken.

18 And then with regard to the new defense that was
19 attempted of Waterhouse did not personally, physically sign the
20 notes, again I feel like we've had a reargument of my Court's
21 denial of the Rule 15 motion to amend here today, but let me be
22 clear. You know we always say context matters. And when this
23 Court denied the Rule 15 motion, you know more often than not
24 certainly this Court gives leave to amend in a Rule 15 context,
25 but the Court did not view this as any run-of-the-mill Rule 15

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1 motion. We had, here's the context: Notes that I think in the
2 aggregate two HCMFA notes that were 7.6, \$7.7 million that were
3 executed or not on May 2nd and May 3rd, 2019, just five months
4 before the bankruptcy. It seemed, I'll be blunt, not remotely
5 credible what was being urged here at the eleventh hour, or
6 many, many months into the litigation, that an individual who
7 was CFO of Highland and I guess treasurer, I think that was his
8 title, with HCMFA, that he had not from the get-go, when he was
9 totally accessible to the defendants for many months, because he
10 now works in the Skyview new startup of former Highland
11 employees, it just seemed inconceivable that this late in the
12 game suddenly there was a new-found 'Oh, he didn't sign the
13 notes,' it just did not seem remotely true to the Court, based
14 on what was put before me at that hearing. So I was not going
15 to allow a late-in-the-game Rule 15 amendment when I absolutely
16 did not find the evidence credible to support the motion.

17 So I am going to grant the motion to strike any
18 references to this defense of Waterhouse did not actually just
19 sign the notes. So, again, I'm denying any sanctions. I'm
20 going to take the defendants at their word that they were
21 somehow needing to do this to preserve the record on appeal but
22 they've got other ways of preserving and I'm not letting this in
23 the record.

24 Mr. Morris, I am going to ask you to upload an order
25 that needs to be specific. I mean I know it's easy to carve out

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1 the Pully report, but as far as any and all references to the
2 Waterhouse-did-not-sign-the-notes defense, I would prefer for
3 you to sift through and put in the order where those are so the
4 record is just -

5 MR. MORRIS: Your Honor, if I may, we've already done
6 that, and I think attached to my declaration in support of the
7 motion to strike, which -

8 THE COURT: Okay.

9 MR. MORRIS: - just as one example, could be found at
10 the HCMFA Docket 131. We already highlighted the portions of
11 the pleadings that we thought ought to be stricken as amended by
12 the errata that was -

13 THE COURT: Oh, that's -

14 MR. MORRIS: - filed at Docket 141.

15 THE COURT: That's -

16 MR. MORRIS: That's what the errata is, because I made
17 a mistake, so we corrected that.

18 THE COURT: Okay.

19 MR. MORRIS: But what I'd like to do with the
20 permission of the Court is simply attach those pleadings to the
21 order and deem their pleadings amended to strike the language
22 that - that I've already put into the record in support of the
23 motion.

24 THE COURT: Okay. That will work for me mechanically.

25 All right. Well, let's figure out -

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1 MR. RUKAVINA: Your Honor, may I — Your Honor, I have
2 an important question.

3 THE COURT: Okay, go ahead.

4 MR. RUKAVINA: So I understand that I will — I
5 understand that will not be allowed to reference that defense
6 today. I'm obviously willing to respect and follow the Court's
7 instruction.

8 I want to make it clear that the Court is not trying
9 to prevent me from — from arguing anything that has to do with
10 that in front of Judge Starr.

11 THE COURT: I don't know what — what you mean. Are
12 you — well, what do you mean? I mean there's either going to be
13 a trial in front of him or not. I doubt he's very likely to
14 give another oral argument on this, but is that what you're
15 talking about, in the unlikely event he gives a second oral
16 argument on this?

17 MR. RUKAVINA: Your Honor, we have not had oral
18 argument in front of Judge Starr. My only concern is that —
19 that if the Court reports and recommends that the MSJ be
20 granted, I believe that I should have the ability before another
21 court to say you should not grant — you should not — you should
22 not go with Judge Jernigan's report and recommendation in part
23 because I was prohibited from raising this defense.

24 Again, I just want to make sure that — that an order
25 commanding me not to say something applies before this Court but

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1 the Court is not trying to prohibit me from – from, in front of
2 any other court, raising whatever defense might be at the court
3 appropriate.

4 MR. MORRIS: If I may, Your Honor?

5 THE COURT: You may. I guess I'm thinking through the
6 most likely scenario, –

7 MR. MORRIS: Insert, yes, –

8 THE COURT: – that the most likely scenario, I guess,
9 is if I make a report and recommendation, grant partial summary
10 judgment, and then there's a time period and the local district
11 court rules where a party can object to the report and
12 recommendation, Mr. Rukavina wants to say, 'I object and one of
13 the reasons I object is the Court didn't consider this
14 argument,' and he wants to know he won't somehow be sanctioned
15 or prohibited by my ruling from making that argument.

16 Am I – am I getting that correctly – correct, Mr.
17 Rukavina?

18 MR. RUKAVINA: That's exactly – that's exactly –
19 that's exactly correct, Your Honor. Because, again, I'm going
20 to take contempt very seriously.

21 MR. MORRIS: And, to be clear from my perspective,
22 Your Honor, I fully expect the defendants, whether it's through
23 an appeal of the prior orders or this particular order or
24 through an objection to your report and recommendations, to try
25 to persuade the district court that your decisions on these

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1 matters was incorrect. What I would not expect them to do is to
2 simply put the Pully report and make this argument as part – as
3 part of their merits-based objection. Because there are orders
4 of the Court right now, so I want to be very clear about this,
5 there will be four different orders of the Court. There will be
6 a scheduling order. There will be the orders denying the motion
7 for leave to amend, the motion to put in the Pully report.
8 There will be the order on this. These are orders of the Court.
9 You don't just pretend that they don't exist and just present
10 the same evidence and the same arguments to the district court.
11 What I think you do is you would either appeal these orders or,
12 at a minimum, and I'm not giving advice here and I'm not
13 consenting to anything, but I would think the approach would be
14 to either appeal the relevant orders or to – or to object to the
15 – to the report and recommendation. This is if Your Honor
16 recommends that the motion be granted in any respect and say
17 that, you know, the motion – the Court – the district court
18 shouldn't accept the bankruptcy court's recommendation because
19 they improperly excluded evidence. So if that's all they're
20 trying to do, they shouldn't expect any concern from me, but if
21 they try to introduce the Pully report, you know, for
22 substantive purposes or try to – without having these orders
23 overturned, that's when – that's when they will need a –

24 MR. RUKAVINA: No, Mr. – Mr. Morris is completely
25 correct, Your Honor. Of course we're not just going to willy

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1 nilly tell the district court, you know, consider these things
2 regardless of what Judge Jernigan ordered. I just want to make
3 sure that by going to the district court and saying, 'Here's an
4 order that I would like you to reconsider or reverse,' that I am
5 not by raising the defense violating this Court's order. And I
6 – just, again, I'm – I've got to protect myself, I've got to
7 respect the Court, I've got to protect my client.

8 THE COURT: Okay.

9 MR. RUKAVINA: I just want to make sure that I don't
10 run afoul of that –

11 THE COURT: I think we're all on the same page here,
12 and that being that certainly you can appeal the order I entered
13 today, you can continue to pursue your motion for
14 reconsideration that's already on file in the district court,
15 and you can argue – in the scenario I grant the motion for
16 partial summary judgment – and let me rephrase that. I don't
17 grant it. There would be a scenario where I might make a report
18 and recommendation to the district court that it grant it. In
19 that scenario, you can follow the district court rules and
20 object to that report and argue among your complaints I should
21 have considered the Pully report – without attaching it – and I
22 should have allowed this defense of Frank Waterhouse did not
23 physically sign. You can make that argument, but, again, that
24 would be in the context of either an appeal of today's order or
25 an objection to a possible report and recommendation of this

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1 Court. Okay?

2 All right. So it's 11:08 according to my clock. I
3 had allocated 30 minutes for the defendant's motion to strike.
4 Can we – you know, it's 15 minutes each side – can we get
5 through that before we take a break? Is everyone good?

6 All right.

7 MR. AIGEN: Yes, Your Honor.

8 THE COURT: Well, who will take the lead, Mr. Root?

9 MR. AIGEN: No, I will, Your Honor.

10 THE COURT: Okay.

11 MR. AIGEN: Mr. Aigen.

12 THE COURT: You may proceed –

13 MR. AIGEN: Are you ready for me to proceed?

14 THE COURT: Yes, please.

15 MR. AIGEN: Thank you, Your Honor.

16 As I said, Michael Aigen from Stinson, representing
17 the defendants. And what I will be doing today is arguing
18 defendants' motion to strike, specifically I'll be arguing that
19 the Court must strike plaintiff's supplemental appendix from the
20 record because it was filed in violation of the rules.

21 As you know, back in December plaintiff filed its
22 motion for summary judgment. And its summary judgment,
23 plaintiff sought summary judgment on defendants' prepayment
24 defenses, which were asserted by two defendants, NexPoint and
25 HCMS. We then filed our response. In our response, we pointed

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1 out that plaintiff forgot, for whatever reason, to include any
2 evidence or any arguments with respect to HCMS' prepayment
3 defense, as opposed to NexPoint, which was actually briefed by
4 plaintiff.

5 So then in February of this year, plaintiff filed its
6 reply. Along with its reply, it filed an additional appendix
7 continuing new summary judgment evidence. What this new summary
8 judgment evidence included was a declaration from Mr. Klos,
9 which was two pages of new testimony from him attempting to
10 address, for the first time, HCMS' prepayment defense.

11 Now nowhere in the reply did plaintiff even attempt to
12 explain why it didn't include this testimony in its original
13 motion or why it should be allowed to introduce new evidence in
14 violation of the rules. I conferred with counsel for plaintiff
15 about this and gave them an opportunity to either withdraw the
16 Klos declaration or explain why this new evidence in the reply
17 was appropriate. In response, rather than withdrawing it or
18 even providing any legal authority, the only answer I got was
19 the reply declaration was a classic reply. I'm not really sure
20 what that means, but respectfully it doesn't really matter at
21 this point.

22 As you're well aware, the Northern District of Texas,
23 as does throughout the Fifth Circuit, unambiguously prohibits
24 summary judgment movant from introducing new evidence in its
25 reply. This is not a controversial legal proposition and it's

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1 not only not disputed by plaintiff but this general rule is
2 stated in all of the cases that plaintiff put in its brief. And
3 this makes sense. It's designed in order to avoid prejudice,
4 like we'd have here where we'd have no opportunity to contest or
5 address evidence filed on part of a summary judgment. The
6 Racetrack Petroleum (phonetic) case we cited is just like our
7 case, where the district court considered this exact issue,
8 defendant filed a summary judgment reply and submitted new
9 evidence with it, and the plaintiff sought to strike it, and the
10 district court struck it as new evidence.

11 And, to make matters worse here, plaintiff still
12 hasn't even bothered to file a motion for leave or sought leave
13 in any way here. Instead, their argument is plaintiff suggests
14 that the new Klos declaration is somehow proper because the HCMS
15 prepayment defense was made for the first time in the summary
16 judgment response. This is in their response at paragraph 20.

17 Two points here. Initially, that simply is not true.
18 As we explained in detail in our reply, we confirmed to counsel
19 that the prepayment defense was part of our justification
20 defense. And, as a result, our corporate rep was questioned at
21 length on this defense by plaintiff. In other words, plaintiff
22 is not going to be able to sit here and seriously argue today
23 that it was not aware that HCMS was asserting its prepayment
24 defense when plaintiff filed its summary judgment, after it
25 specifically deposed our witness on this exact defense.

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1 Plaintiff's only specific complaints about our
2 client's testimony related to defense is that our corporate rep
3 didn't memorize the exact dates on when these specific payments
4 were made, something that easily could have been resolved if
5 plaintiff's attorney showed the witness the relevant documents
6 as was suggested to him, but they didn't bother to do it, so
7 they didn't get the information they wanted. That's their only
8 complaint about the questions they asked regarding this defense.

9 In other words, this wasn't a new defense that we
10 raised for the first time in our summary judgment response.
11 That's not the case. Plaintiff knew about this defense and took
12 discovery on it, but didn't like our answers. The simple fact
13 is plaintiff either forgot to address HCMS' prepayment defense
14 in its judgment or made some tactical decision to withhold it.
15 They included HCMS in its headings related to the prepayment
16 defense along with NexPoint, but they only address NexPoint.
17 Not sure why, but clearly a mistake was made.

18 More importantly, none of this really matters. Even
19 if this was a new defense, the law is clear: New evidence is
20 not allowed in the summary judgment reply. We detail in our
21 brief, as we talk about in our reply brief, none of the
22 unpublished cases cited by plaintiff say that new evidence is
23 allowed to be submitted in reply briefs. In fact, those cases
24 recognize the opposite.

25 For example, we have the Lynch case that was cited by

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1 plaintiff. In that case, the court did allow additional
2 evidence but for a very specific reason. In that case, the new
3 evidence was deposition testimony as obtained – or that was
4 obtained as a result of the other party's request to delay the
5 summary judgment hearing and take this additional discovery.
6 That's obviously not the case here.

7 And these cases, like they cite, like the Banda
8 (phonetic) case cited by plaintiff, actually say that a summary
9 judgment movant may not file a reply brief appendix without
10 first obtaining leave of court. They could have filed a motion
11 for leave. They chose not to do it for whatever reason.

12 Additionally, I point out that these few unpublished
13 cases cited by plaintiff, such as the Murray (phonetic) case and
14 the Banda case, only allow new evidence in what the courts call
15 very limited circumstances, where the new evidence was not part
16 of a new argument. And that's important here because that's
17 clearly not the case here.

18 This is not a situation, Your Honor, where plaintiff
19 is clarifying or even supplementing arguments made in its
20 original motion for summary judgment briefing related to HCMS'
21 prepayment defense. That's not the case here. Plaintiff never
22 made any argument related to HMS and its prepayment defense in
23 its original briefing. This is a completely new argument that
24 they're making for the first time in reply, making the
25 unpublished cases they cited very different than our case. This

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1 is a simple issue for the Court. Defendants' request that the
2 Court strike the appendix containing new evidence from the
3 record because it was found in violation of the rules. To hold
4 otherwise, Your Honor, would be rewarding plaintiff for its
5 failure to follow the rules and either seek leave or file the
6 evidence in the original motion like it was supposed to.

7 Thank you, Your Honor.

8 THE COURT: All right. Is this going to be Ms.
9 Winograd's argument?

10 MR. MORRIS: You're on mute.

11 MS. WINOGRAD: Good morning, Your Honor. My name is
12 Hayley Winograd, at Pachulski, Stang, Ziehl and Jones,
13 representing Highland Capital Management, L.P. May it please
14 the Court?

15 THE COURT: Yes, you may proceed.

16 MS. WINOGRAD: I agree with opposing counsel. This is
17 a very straightforward issue, Your Honor. There is nothing
18 complicated about it.

19 The second Klos declaration is properly – is properly
20 included with the reply because it serves the sole purpose to
21 rebut argument and evidence raised by HCMS for the first time in
22 its response brief. Fifth Circuit law is clear that when a
23 nonmovant raises evidence or argument for the first time in its
24 response to summary judgment, the movant is entitled to address
25 and rebut that argument in its reply. That's exactly what

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1 happened here.

2 Highland did not learn of but facts underlying HCMS'
3 prepayment defense until HCMS filed its response to summary
4 judgment. I want to briefly summarize the time line for the
5 Court.

6 HCMS never actually pled its prepayment defense. On
7 October 29th of 2021, when counsel deposed Mr. Dondero as HCMS'
8 30(b)(6), Mr. Dondero was unable to identify any substantive
9 allegations underlying HCMS' prepayment defense. And, most
10 importantly, he did not identify the HCMS amortization schedule.

11 The first time HCMS identified the amortization
12 schedule was in its response to summary judgment. That opened
13 the door to Highland addressing and rebutting the HCMS
14 prepayment defense premised on the amortization schedule.
15 Highland included the second Klos declaration in its reply for
16 the purpose of addressing and rebutting the prepayment defense
17 premised on the amortization schedule. This is not the type of
18 new evidence or new legal theory contemplated under Local Rule
19 56.7 because it does not constitute new argument. It is
20 rebuttal argument. It is precisely the type of reply evidence
21 permitted under Fifth Circuit law.

22 I don't want to bog the Court down with case law, but
23 I do want to flag one case particularly on point and that is
24 *Lynch v. Union Pacific Railroad*. It's a Northern District of
25 Texas case cited in our papers and discussed by Mr. Aigen.

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1 The Court denied the nonmovants' motion to strike
2 evidence attached to the movant's reply in support of summary
3 judgment, noting that evidence was specifically directed at and
4 responsive to arguments and evidence relied on the nonmovant in
5 their response. Noting this is not a situation in which new
6 issues were raised for the first time in a reply, the Court held
7 that to hold otherwise would allow the nonmovant an unfair
8 advantage, using a gotcha procedural approach. Here too the
9 evidence attached to Highland's reply in support of summary
10 judgment is specifically directed at and responsive to evidence
11 and argument – arguments raised for the first time in HCMS'
12 response to summary judgment.

13 In suggesting that there is somehow a blanket
14 prohibition on attaching evidence to a reply in any and all
15 circumstances in summary judgment, defendants ignore the law.
16 But defendants must agree with the law on some level, because
17 they attach an appendix to their reply in support of their
18 motion to strike Highland's reply appendix. And they did so for
19 the simple and proper purpose of rebutting an argument Highland
20 made in its response to defendants' motion to strike. And it's
21 not a reply in support of summary judgment, but it's the same
22 concept.

23 The notion that Highland somehow forgot to address the
24 HCMS prepayment defense in its motion for summary judgment is
25 belied by the record. Two defendants assert the prepayment

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1 defense, NexPoint and HCMS. Highland was able to adequately
2 address NexPoint's prepayment defense in its motion for summary
3 judgment because Highland was aware that in support of that
4 defense, NexPoint was specifically relying on the NexPoint
5 amortization schedule.

6 The NexPoint amortization schedule was referenced
7 extensively throughout counsel's depositions of Klos, Seery, and
8 Hendrix. The same is not true with HCMS. HCMS never identified
9 the amortization schedule until it filed its response to summary
10 judgment.

11 Defendant also implies and argues in its papers that
12 counsel's vague reference to digging out the spreadsheet during
13 a seven-hour deposition was somehow enough to put Highland on
14 notice that HCMS was relying on its amortization schedule and
15 that we took discovery and that we were actually in possession
16 of this document. We were in possession of a lot of documents,
17 but it was our job to conduct a fishing expedition in order to
18 figure out what specific document counsel may have been
19 referring to during his deposition. If Highland was aware that
20 HCMS was specifically relying on the HCMS amortization schedule
21 in connection with its prepayment defense, it would have
22 addressed this defense in its motion for summary judgment but
23 the same way it able to do with NexPoint.

24 Highland's inclusion of the Klos declaration in its
25 reply to summary judgment serves the singular purpose of

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1 addressing and rebutting argument and evidence raised for the
2 first time in HCMS' response to summary judgment in connection
3 with it prepayment defense. And, in doing so, it serves to
4 close the door on this issue and aid the Court in determining
5 whether, based on all of the evidence before it, there is a
6 genuine issue with material fact regarding the merit of the HCMS
7 prepayment defense.

8 Again, this is not the type of new evidence
9 contemplated under Local Rule 56.7 because it constitutes
10 rebuttal argument. It serves to rebut argument raised by HCMS
11 in its response to summary judgment. For these reasons,
12 defendants' motion to strike the reply appendix should be
13 denied. Thank you.

14 THE COURT: All right. Mr. Aigen, your rebuttal.

15 MR. AIGEN: Yes, Your Honor. Accepting plaintiff's
16 counsel's argument would mean that any party could sit on their
17 hands, stick their head in the sand, not ask questions about a
18 particular defense, and then have the privilege of putting in
19 all their defenses in a reply and just skip putting it in the
20 motion. They keep saying this was addressed in the first time
21 for summary judgment, but then also concede and admit and agree
22 with me that they questioned our corporate rep on this exact
23 defense. It clearly was not a defense we asserted for the first
24 time in summary judgment, when they questioned our witness on
25 it.

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1 They talk about this amortization schedule and tell
2 you we should have identified it, but yet we don't hear a
3 response to when our witness said, 'I don't have the dates
4 memorized,' and our counsel said, 'Why don't you use a document
5 to refresh them,' we don't hear a response as to why counsel
6 didn't say, 'Hey, that's a good idea. Where is that document,
7 what is that document?' They just said, 'Nope, I'm fine, stuck
8 their head in the sand and preceded to play a game of Gotcha.
9 That's not how this works.

10 They knew about this defense. They took discovery on
11 it. They filed a summary judgment. And, respectfully, is -
12 there was a date. The heading says HCMS and NexPoint. The
13 section and the briefing under it don't even mention HCMS. If
14 they were relying on the fact that they knew nothing about this
15 defense which was asserted, they would have wrote that in their
16 brief. If they didn't know HCMS was asserting a prepayment
17 defense, they wouldn't have included them in the caption.

18 They made a mistake. They want to run from it.
19 That's not proper here. They have to follow the same rules we
20 do. They could have filed a motion for relief. They didn't
21 bother. Maybe they just didn't want to delay any of these
22 proceedings, I don't know. They talk about this being classic
23 evidence. The only case that they've mentioned now is the Lynch
24 case. And I will reemphasize what I talked before, in Lynch the
25 only case they have brought to you now in this argument that

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1 they think supports them, the additional discovery, the
2 additional evidence was submitted were depositions taken after
3 the summary judgment was filed. So of course the Court let that
4 in. The other party requested that discovery and, according,
5 said these are very limited circumstances and you need to go
6 file a motion for relief.

7 I will repeat, Your Honor. If this is allowed, any
8 party could stick their head in the sand, not ask questions, and
9 all of a sudden they didn't know the answers, so they could wait
10 till the summary judgment reply, put in evidence, and not be
11 able to get I it rebutted.

12 And I think it's important – the Klos declaration,
13 what it talks about in paragraphs 3 and 4. It talks about the
14 payment was made applied at Mr. Dondero's direction to ensure
15 that the note had no interest outstanding.

16 And, in paragraph 4, it talks about that Mr. Dondero's
17 direction to make the payments conclusively establishes that
18 HCMS knew that all interest due as of December 31st was required
19 to be paid, notwithstanding a prior prepayment.

20 What this means is that Mr. Klos is testifying to
21 directions allegedly made by Mr. Dondero regarding the payment.
22 The reasons that Mr. Klos believes that such payments were made
23 and what he thinks HCMS knew and didn't know, without providing
24 – so, basically, he's testifying on the state and mind of intent
25 of a client, stuff he's never testified to before, without

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1 giving us the chance to rebut it. And their reason for thinking
2 they get to do this is they didn't bother asking questions on a
3 defense we asserted, even after it was suggested to them, 'Hey,
4 let's use documents,' and now they have the nerve to come up
5 here and say, oh, well, we – you know, although they produced
6 the document to us, we have too many documents. How were we
7 supposed to know what document they were going to use even
8 though counsel in the middle of the deposition said, hey, maybe
9 we should use documents to get the answers to this. And they
10 said, no, we don't feel like it.

11 That's not allowed, Your Honor. They're here today
12 saying we need to abide by the black letter of every rule. They
13 need to do the same thing. Thank you, Your Honor.

14 THE COURT: A couple of questions. Do you disagree
15 that this defense was never pleaded?

16 MR. AIGEN: We pled it as part of justification. And
17 we made it clear prior to the deposition, just in case, we told
18 counsel, and in correspondence this is recorded, that our
19 prepayment defense was part of justification. And they then
20 proceeded to take our deposition on that defense. They had no
21 issues with that. And if, for some reason, they're taking the
22 position today that this is all based on something we needed to
23 plead and didn't, then that's a proper basis for summary
24 judgment. It's not a proper basis for violating a completely
25 different rule about what you could stick in a reply brief. So

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1 we did plead it, we called it justification –

2 THE COURT: So elaborate. So elaborate. I don't have
3 it in front of me, but I don't know if I need it right in front
4 of me, what was the exact wording of your justification defense?

5 MR. AIGEN: In the actual answer, which I don't have
6 in front of me, we called it justification, and there wasn't
7 details on it. And then to make it clear before the corporate
8 rep deposition, because he was testifying on our defenses, we
9 sent a letter saying that similar – and this is in the record, I
10 don't have it right in front of me, but it's part of this where
11 we said to them, hey, this includes the prepayment defense, just
12 like NexPoint.

13 THE COURT: Okay.

14 MR. AIGEN: And, again, Your Honor, –

15 THE COURT: Go ahead.

16 MR. AIGEN: Sorry. I was going to say even if what
17 they're trying to argue is we can't bring a defense today
18 because it wasn't pled properly in our answer – which I disagree
19 with – but even if they're saying that, the proper recourse was
20 then to move for summary judgment on that defense, which they
21 knew of, and try to strike it, not to violate the other
22 different rules of their choosing by putting additional evidence
23 in a reply brief. You don't get to pick and choose which rules
24 you want to violate because you think someone else violated a
25 different rule. You have to go to court to seek leave to get

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1 the relief you want.

2 THE COURT: Okay. What about if you could squarely
3 address the argument that it's – it's rebuttal evidence, it's
4 not new evidence because the amortization schedule was included
5 in the response?

6 MR. AIGEN: It's not – that's a good question, Your
7 Honor. The amortization schedule is our evidence. What their
8 evidence is, is Mr. Klos coming in and interpreting it and
9 telling you why Mr. Dondero made certain payments, without any
10 discussion of how he knows that. So the amortization schedule
11 is in the record. We put it in. They – we produced it to them.
12 They have it, they had it all along. The new evidence that
13 we're objecting to is Mr. Klos coming in and providing his
14 subjective interpretation as to what HMS knew and thought and
15 believed when it made payments in accordance with that schedule.
16 That's the reason they want to get the Klos declaration in, not
17 to prove payments were made or not made in the amortization
18 schedule.

19 THE COURT: You don't think that's rebuttal evidence?
20 You don't think that's rebuttal evidence, rebutting the –

21 MR. AIGEN: Everything in a reply – yeah, everything
22 in a reply is being used to rebut things we stick in a response.
23 That doesn't change the law that you can't stick new evidence in
24 to do that. The rules and the law and the cases say you can
25 make rebuttal arguments, you can't stick rebuttal evidence in.

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1 You have to seek motions for leave. In the very limited
2 situations where courts did allow additional evidence, like we
3 said, all the cases they cite say no new evidence in reply, but
4 let me look at these very exceptional circumstances here.

5 So rebuttal arguments, yes. Rebuttal evidence, no.
6 And the exceptional circumstances, as I said, the case they rely
7 on is the Lynch case where the discovery and the new evidence
8 they were fighting over was taken after the summary judgment at
9 the request of my side, so of course it made sense for it to
10 come in. So, yes, they're using it to rebut, but they're using
11 it as rebuttal evidence, which is improper, not rebuttal
12 argument, which would be proper.

13 THE COURT: Okay. All right. I think now is a good
14 time for a break. I'm going to go deliberate on this a few
15 minutes. The question is do we want it to be a short 15-minute
16 break or maybe a 30-minute lunch break. Any – because we're
17 going to have a long, I think, four hours to go here.

18 MR. MORRIS: To the extent my voice carries any weight
19 at all, Your Honor, my preference would be to take the longer
20 break and then just sit for the summary judgment argument.

21 THE COURT: Okay. Votes?

22 MS. DEITSCH-PEREZ: If I could weigh in, just for the
23 purposes of making sure we're all able to pay attention when
24 we're arguing, I would just ask that if Mr. Morris is going to
25 go on for two hours, that we at least have a break before, you

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1 know, a restroom break before we start up again.

2 THE COURT: Okay, that makes sense.

3 MR. MORRIS: No problem with that. Yeah.

4 THE COURT: Any – any other views?

5 All right. Well, let's go ahead and take a 30-minute
6 break. We'll come back and I'll give a ruling on this motion to
7 strike and then we'll hear Mr. Morris' motion for summary
8 judgment. And then we'll take another break, you know, a
9 15-minute or so break. And then I'll hear the defendants'
10 responses. All right, we'll see you at 12:02.

11 COURT SECURITY OFFICER: All rise.

12 MR. RUKAVINA: Thank you, Your Honor.

13 MS. DEITSCH-PEREZ: Thank you, Your Honor.

14 (Luncheon recess taken from 11:33 a.m. to 12:21 p.m.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: All right. Please be seated.

17 I apologize for the wait. Spent a little more time
18 drilling down on the pending motion to strike than I thought I
19 would need to.

20 We have everyone here it looks like that we need.

21 I have one last question before I give a ruling on the
22 motion to strike the supplemental David Klos declaration. Is
23 there a stipulation that is somehow relevant to this analysis?
24 I saw in the papers a dangling reference to 'We have the
25 stipulation.' I think it was – I can't remember if it was an

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1 attachment, an email attachment to the motion to strike. I
2 think that's where it was, where there was –

3 MS. WINOGRAD: Yes, Your Honor.

4 THE COURT: Go ahead.

5 MS. WINOGRAD: I can answer that.

6 THE COURT: Okay.

7 MS. WINOGRAD: Highland and NexPoint stipulated that
8 NexPoint has a prepayment defense, and you can different that at
9 Adversary Proceeding 21-3005, at Docket Number 146. And this
10 was filed on January 2nd of 2022. I don't think there has been
11 a stipulation, though, that HCMS had the prepayment defense.

12 THE COURT: Okay. I'm slow to pull that up. Okay.
13 Which – which adversary?

14 MS. WINOGRAD: So that's 21-3005 and that's the
15 NexPoint proceeding.

16 THE COURT: Okay. And, again, what docket entry
17 number? 146? 146, January 2nd.

18 MS. WINOGRAD: And this also describes that NexPoint
19 was using as its supporting documentation the amortization
20 schedule.

21 THE COURT: Um-hum. Okay. And, again, the – your
22 argument is this is significant because there was no similar
23 document in connection with the HCMS and that –

24 MS. WINOGRAD: Exactly. So –

25 THE COURT: Go ahead.

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1 MR. AIGEN: Well, no, Your Honor, that argument was
2 never made in the papers. And I if they did, we would have
3 shown that it was produced to them, as they admitted they had
4 them. They had the document. They're not saying they never got
5 the document –

6 THE COURT: Well, no, they admit they had the
7 document. I've read in the pleading, it was footnote 8 of their
8 response to this motion to strike that they had it, they
9 produced it on June 9th, before HCMS ever answered. So I guess
10 what I'm getting at – and, again, I asked her, so she's
11 answering. You know, this is like –

12 MS. WINOGRAD: But –

13 THE COURT: – I wondered back in chambers, as I was
14 reading the pleadings and thinking through this, was there a
15 stipulation that might shed light on this in some sort for me
16 because it – it was referenced in your motion to strike, I
17 think, where you reached out and asked them to withdraw this.
18 And, as I recall, Mr. Morris said no. And we have the
19 stipulation. And so I was left dangling which stipulation did
20 that mean.

21 MR. AIGEN: Your Honor, I may be mistaken, but I think
22 that stipulation was part of an email. And the reason it was
23 part of the record was the other part of that email was Ms.
24 Deitsch-Perez and making sure the other side was aware that
25 prepayment was part of her justification defense. And that's

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1 why that email was in there. I think that also happened to be
2 connected to the email you're talking about with a stipulation.
3 So it certainly – as I – our answer was it wouldn't be relevant
4 but that, I think, is why it was in the record, because it was
5 part of the full email chain with the other part of it.

6 MS. WINOGRAD: And, Your Honor, if I may be heard,
7 because I believe you asked me a question before counsel
8 interrupted me, –

9 THE COURT: Go ahead.

10 MS. WINOGRAD: – trying to get some clarity on our
11 argument. And I would like to note that you nailed the precise
12 argument. The argument is while we were on notice as of the end
13 of October of 2021 that HCMS was also asserting a prepayment
14 defense, we were not on notice of the supporting documentation
15 underlying that defense as it pertains to HCMS, the way we were
16 with NexPoint. We knew NexPoint was using the amortization
17 schedule. That is – that is the specific document that is
18 central to our argument. We did not know that HCMS was using
19 this specific document. That is why we had our reply include
20 the Klos declaration as a rebuttal argument to the HCMS
21 prepayment defense that we learned was premised also on an
22 amortization schedule that was raised – and that was raised for
23 the first time in their response brief that HCMS had never
24 previously introduced or identified the amortization schedule
25 the way that NexPoint did. And that is why we were able to

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1 address NexPoint's prepayment argument in our initial motion and
2 we weren't with HCMS.

3 MR. AIGEN: And, Your Honor, as we put in our motion,
4 Ms. Deitsch-Perez during the deposition, when they tried to make
5 it a memory test, said, 'Hey, why don't you use the schedules
6 that show the payments,' and the answer from counsel was, 'No,
7 thank you. I'll do it my way.'

8 So I don't know what else they needed other than us
9 introducing exhibits and putting on our own case during our own
10 corporate rep deposition. They took the deposition, they asked
11 the questions. They didn't say what documents, or anything.
12 But counsel still said, our counsel, our side, said, 'Hey, why
13 don't you use the documents,' and their answer was literally,
14 'No, thank you.'

15 MS. WINOGRAD: But —

16 MR. AIGEN: Not, 'I'll get back to it later'; 'Hey,
17 tell me what documents'; 'They didn't serve discovery; what are
18 you relying on?' We offered it to them, and they said no thank
19 you. They're sticking their head in their sand, and they don't
20 get rewarded for that, Your Honor.

21 MS. WINOGRAD: It's — the burden is on the defendants
22 to prove each element of their affirmative defense. When we
23 asked from the belt their prepayment defense, they could not
24 provide us with any allegations in support of that defense,
25 including in pertinent part the amortization schedule they are

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1 now relying on. It is not our burden to tell them what
2 documents they are relying on.

3 THE COURT: Okay.

4 MR. AIGEN: Your Honor, I don't know what can't – what
5 didn't provide. Counsel said, 'Hey, use the documents.' and
6 they said, 'No, thank you.'

7 THE COURT: All right.

8 MR. AIGEN: Well, you can use the documents that shows
9 payments. They wanted to make a memory test.

10 THE COURT: I've heard enough.

11 Well, thank you all for your arguments. I know a lot
12 of ink was spilled on this issue and, like I said earlier this
13 morning, this is not a terribly easy contested matter. But I am
14 going to grant the motion to strike. I guess what matters to me
15 more than anything else is that the amortization schedule for
16 HCMS was not a surprise to the plaintiff, in fact they are the
17 ones who apparently initially produced it, again according to
18 this footnote, on June 9th, 2021. So I am going to stick to the
19 normal rule that we don't attach evidence to a reply absent a
20 motion for leave and the Court having a contested hearing on
21 that.

22 So I will ask Mr. Aigen to upload an order on that
23 motion.

24 All right. Well, at long last, it's 12:30. We'll now
25 turn to the motion of Highland for partial summary judgment on

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1 each of these different notes.

2 Mr. Morris, you may proceed.

3 MR. MORRIS: Thank you, Your Honor. John Morris,
4 Pachulski, Stang, Ziehl and Jones, for Highland Capital
5 Management, L.P.

6 I want to begin, Your Honor, by thanking you and your
7 staff for the work that's been done on this. This should have
8 been a simple collection – collection action on some unambiguous
9 promissory notes, but the record is obviously quite voluminous.
10 And I've spend the last, you know, year plus kind of playing
11 whack the mole and trying to figure out where the defense is
12 going to shift. Every time I find evidence to rebut an
13 assertion or a contention, a new one arises, a new defense
14 arises, a new twist on the defense arises.

15 And it's been – it's been challenging, but I don't
16 think that all of the maneuvers mount to a hill of beans,
17 frankly. I think that the presentation that we made in our
18 motion and in our reply, Your Honor, I'm certain that you've –
19 you've spent some time with that. I'm a hundred percent
20 confident that my team and I have fairly cited to the
21 evidentiary record. There is actually very little argument, I
22 think, that we make in our papers. It is more a presentation of
23 what we believe are the undisputed facts.

24 And, again, I appreciate you – this has been –
25 (Tones.)

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1 MR. MORRIS: - a lot of work for everybody, and let's
2 just - let's just get on with this now.

3 And so I'd ask Ms. Canty if she could put up the slide
4 deck that I circulated to the Court and to counsel prior to the
5 beginning of this matter. And if we could just go to the next
6 slide.

7 I want to begin, Your Honor, where I think I ought to,
8 and that is the law. And I don't presume to tell the Court what
9 the law is. The law on summary judgment, I'm sure, is well
10 known to the Court, but with those kind of cautionary remarks, I
11 would just like to go through the legal standards which,
12 consistent with my practice, I try to footnote everything so the
13 Court can see exactly where it's coming from, so you can see the
14 paragraphs of our brief that the following comes from. And I
15 don't think there's any dispute about the standards, so let me
16 just go through it quickly.

17 Obviously under Rule 56(d), the standard is that there
18 be no genuine dispute of a material fact, right. And so what
19 does "genuine" mean? A dispute about a material fact is genuine
20 if the evidence is such that a reasonable jury could return a
21 verdict in favor of the nonmoving party. That's - that's the
22 standard, right. It's not is there a - you know, it's not a
23 criminal case, I don't have to prove beyond reasonable doubt. I
24 don't have to prove, you know, any standard other than this one.

25 I don't have to prove that there's no disputes of

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1 fact. Obviously, you know, if I said today is Wednesday, the
2 defendants would probably say, no, it's not, it's the day after
3 Tuesday, or it's the day before Thursday. This is – you know,
4 this is the nature of this particular case. But let's be clear.
5 A dispute about a material fact is genuine only if the evidence
6 is such that a reasonable could return a verdict in favor of the
7 nonmoving party.

8 I think it can meet its burden in one of two weeks.
9 It can demonstrate an absence of evidence, supporting the
10 nonmoving party's claims or, in this case, defenses; or it can
11 succeed by proving the absence of a genuine issue of disputed
12 material fact.

13 The defendants have to show here, more than some
14 metaphysical doubt as to the material facts. They can't satisfy
15 their burden by relying on conclusory allegations or
16 unsubstantiated assertions are only a scintilla of evidence.
17 The Fifth Circuit has held where critical evidence is so weak or
18 tenuous on an essential fact that it could not support a
19 judgment in favor of the nonmovant or where it is so
20 overwhelming that it mandates judgment in favor of the movant,
21 summary judgment is appropriate.

22 And if we go to the next slide, here is the thing,
23 Your Honor, in all that paper you have, the part that consumes
24 the least amount is our claims, our claims for breach of the
25 demand notes and breach of the term notes. And why is that?

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1 Because there is no way to contest it with the exception of
2 HCMFA. And I know Mr. Rukavina has passionately attempted to
3 argue that they're not liable under the notes, but in the
4 evidence that we cited to in our motion, in Mr. Dondero's
5 declaration he really admits – although I don't know what Soft
6 Note is, that's just my own lack of knowledge I guess – I don't
7 think that it matters that it was unsecured, right, I don't
8 think any of that matters, but the essential elements are met.
9 There are, with the exception of HCMFA, everybody agrees that
10 they signed the notes, everybody agrees that they received the
11 money, everybody agrees that the notes were given in exchange,
12 and everybody agrees that they didn't pay in December 2020. And
13 so what we put on the screen, which we take from the first Klos
14 declaration, as to which there was no objection, the damages
15 that arose, you know, unpaid principal and interest as of the
16 date of the motion. And obviously this will have to be updated
17 if this Court either recommends and the district court grants
18 or, you know, whenever we get a judgment, if we ever get a
19 judgment this will have to be updated, but we present on this
20 slide the damages as of the motion date for the demand notes.

21 And if we can go to the next slide, we've got the
22 damages under the term notes. And then we're entitled to cost
23 of collection. Whether it's a demand note or whether it's a
24 term note, they both unambiguously provide that if we have to go
25 to bankruptcy court or otherwise seek to collect, you know,

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1 engage counsel, we're entitled to our costs of collection.

2 We've put in a lot of evidence about those costs, but we can't –
3 you know, we're like a dog chasing our tail here, those costs
4 continue to increase at this moment.

5 And so we specifically noted in our motion at
6 footnotes 31 and 32, I believe, that we reserve the right, that
7 we wanted an opportunity to come in and litigate, you know, the
8 issue of costs. And, in fact, that's exactly what Rule 54(d)(2)
9 provides.

10 So if a judgment is entered, we'll have that
11 opportunity. And the only thing that we ask the Court to find
12 here, if the Court finds that we're entitled to any portion of
13 the motion for summary judgment or, you know, if you're going to
14 make that recommendation, that you also make the recommendation
15 that Highland is entitled to its costs and fees pursuant to the
16 plain and unambiguous terms of the notes.

17 If we can go to the next page. This is just a summary
18 of the various defenses. Just to try to make it easy so the
19 Court has a score card, there is, you know, four or five
20 principal defenses, different defendants assert different
21 defenses, so we have just kind of laid it out here so the Court
22 has an understanding, right. And the reason that HCMFA doesn't
23 claim the oral argument subsequent – condition subsequent defend
24 is because they claim that the note should never have been
25 signed, it was a mistake and without authority. So they can't –

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1 I guess they could have pleaded in the alternative, but they
2 didn't. And so you've got – you know you've got some
3 differences, right? The failure to perform under the shared
4 services agreement. That would be inconsistent with HCMFA's
5 defense, and I don't even think Mr. Dondero contends that he had
6 a shared services agreement. And no defendant except for
7 NexPoint or HCMS contends that they prepaid.

8 So that's kind of a summary of the allegations. And I
9 want to start with the first one, the oral agreement, the
10 condition subsequent. If we can go to the next slide. I'm sure
11 Your Honor has heard the saying, you know, people don't like to
12 see how the sausage is made and there's a reason for that. And
13 the reason is it's usually pretty ugly. But what we set out
14 very clearly in our moving papers, which I think was completely
15 ignored by the defendants is how the allegations concerning this
16 alleged agreement that Mr. Dondero or agreements that Mr.
17 Dondero entered into with his sister materially changed over
18 time.

19 And I think that that's critical, because if you go
20 back to the legal standard, Your Honor, of course you know one
21 of the things you'll have to consider in issuing your report and
22 recommendations is whether a reasonable jury is going to buy
23 this defense. Are there enough disputed facts that would enable
24 a jury to say, yeah, this defense makes sense to me. This is
25 totally credible.

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1 I'm not asking you to make credibility findings on
2 witnesses, right. You haven't seen any witnesses to do that.
3 You're just reading paper, but – but these are the undisputed
4 facts. There are – everything I'm about to say is undisputed.

5 These actions were commenced in January of 2021. And
6 in Mr. Dondero's initial answer on March 3rd, again citations to
7 the footnote here, Mr. Dondero asserted that Highland was not
8 entitled to recover on the notes and that their claims should
9 be, quote, barred, because it was previously agreed that
10 plaintiff would not collect on the notes. So that was his
11 position: You can't collect because there is an agreement that
12 you wouldn't collect. Okay.

13 What's really – what's really notable here, and I'll
14 talk about this more in a moment, is that none of the other
15 three corporate defendants, NexPoint, HCMS, HCRA, who now assert
16 the exact same defense, none of them put that in their initial
17 answer. And why is that significant, Your Honor? Because Mr.
18 Dondero is the source of this affirmative defense that he put
19 into his defense. Why wasn't it put into any of the corporate
20 defendants' defenses initially? And obviously that's a question
21 that I would ask Mr. Dondero if we were actually in front of a
22 jury: How do you explain the fact that you forgot to assert
23 this defense on behalf of all of these corporate defendants?

24 So we proceed. We served some discovery. We asked
25 Mr. Dondero in light of this defense admit that you didn't pay

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1 any taxes on the money that the plaintiff agreed not to collect.
2 And realizing that he didn't pay taxes, right, this is
3 undisputed facts, he answered – he amended his answer at the
4 last second, I think he was within the time period where he
5 could still unilaterally amend his answer, to add the magic
6 words: Upon fulfillment of conditions subsequent. So now
7 instead of an agreement in the past that was already in place
8 for forgiveness, now it was going to be dependent on some future
9 event.

10 Ten days later, because this is an adversary
11 proceeding and you have to comply with Rule 26, Mr. Dondero
12 makes his initial disclosures under Rule 26. And this is not
13 some, you know, happenstance kind of presentation. Mr. Dondero
14 took the time to identify 15, quote, individuals likely to have
15 discoverable information. But his sister wasn't on it. So if
16 we ever get to a jury, he's going to have to explain to a jury
17 why he forgot in his long list of more than a dozen individuals,
18 which I think includes me, by the way, he thought to include me,
19 but he didn't include his sister, the person with whom he
20 entered these agreements. And, remember, Your Honor, we got
21 this in our – I think it's in our reply. If you look at Mr.
22 Johnson, Mr. Dondero's expert, his analysis of Mr. Dondero's
23 compensation, he was only paid \$500,000 a year for the three
24 years during which all of these notes were entered, for a total
25 of about a million five or a million seven, and we're talking

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1 about the forgiveness of \$70 million of notes, right. Can you
2 imagine sitting in front of a jury and saying what would you do
3 – and we're going to talk about this in a moment – if you made
4 \$50,000 a year and somebody said there's a way to get two
5 million. Well, that's the position that Mr. Dondero found
6 himself in. And yet on April 15th, he forgot his sister. He's
7 going to have to explain that to the jury.

8 But it gets better, because – or better for us,
9 anyway. This is the sausage being made, Your Honor. This is
10 what I meant about whacking the mole. So now on December – on
11 April 26th, he answers some additional discovery requests. And
12 we ask him specifically: Who entered the agreement on behalf of
13 the debtor. Who entered the agreement on behalf of Highland.

14 Again, you can look at Exhibit 82, page 4, Answer to
15 Interrogatory Number 1, these are just undisputed facts that Mr.
16 Dondero said, quote: The agreements were entered into on behalf
17 of the debtor by James Dondero, subsequent to the time each note
18 was executed. He did. That's his story. This is in response
19 to interrogatories. I believe they're sworn. But whether they
20 are or they aren't, the fact remains that as of April 26th, he
21 took responsibility and said he entered the inter- – into the
22 agreements by himself.

23 He was also asked now more specifically, not just to
24 disclose who had information, who he thought had information
25 about the case, we served him an interrogatory that says: Tell

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1 us everybody who knows about the alleged agreements. Tell us
2 everybody. And, again, he identifies five people, none of whom
3 have any relevant evidence, by the way. Right, they're not –
4 they weren't deposed, they're not – there's nothing in the
5 record about the people who he actually identified. But, again,
6 kind of a glaring omission. Who has actual knowledge of the
7 alleged agreement, not Nancy. Not in this interrogatory
8 response. Sausages being made.

9 They make a motion to compel, Your Honor. I don't
10 know if you recall, but they made a motion to compel to require
11 Jim Seery to testify, I think, about the history of the
12 forgiveness of loans. And we opposed the motion. And we had an
13 oral argument. And, if my colleague Ms. Canty can put up on the
14 screen the transcript of the hearing, just a portion of it, so
15 this is the hearing. The hearing occurs on May 20th. And if we
16 can go to page 23, towards the bottom, you're going – my
17 response to this, Your Honor.

18 So I say, quote, let's look at what the defenses are,
19 and why we feel like it's a burden to even entertain these
20 concepts, his first answer, Your Honor, said that the notes were
21 forgiven based on an agreement. So we asked him in an
22 interrogatory or a request to admit, I forget which, shows us
23 your tax returns, that you paid the taxes. Of course he didn't
24 pay the taxes because of course the note wasn't forgiven. So
25 instead he amends his answers, he amends the affirmative defense

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1 to add the words: Pursuant to a condition subsequent.

2 Okay, he didn't say that the first time. The first
3 time it was: It was forgiven. And now it's not forgiven. But
4 it's basically deferred until a condition subsequent. So he's
5 not even contending, if you look at his amended answer, he's not
6 even contending that it was forgiven. He's simply saying that
7 the obligation to repay has been deferred pursuant to an oral
8 agreement, under which he does not have to pay, until the debtor
9 completes the liquidation of his assets. Basically, if you read
10 it, that's what it says, and that's how we got here.

11 Keep scrolling, please.

12 I continue. I don't know if you picked up on it, Your
13 Honor, but in response to an interrogatory, when we said, "Who
14 made the agreement on behalf of the debtor," Mr. Dondero said
15 that he did. Okay, this isn't an oral agreement unless he was
16 talking to himself. This is something that happened, according
17 to him, in his head, that somehow he, as the maker of the note,
18 had a discussion with himself in his capacity as the chief
19 executive officer of the debtor, and the two of them, in his
20 head, agreed that he wouldn't have to pay. Initially wouldn't
21 have to pay at all and now apparently doesn't have to pay until
22 the debtor completes its sale of assets. This is what the
23 defense is here.

24 Please continue.

25 So let's be very, very clear about it. It's not an

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1 oral agreement, it's something that he's making up in his head
2 that he didn't make up the first time, that he changed the
3 second time, and that he, that he can't describe at all. One of
4 the interrogatories said, "When did this take place," he didn't
5 answer that part of the interrogatory. He wasn't — he hasn't
6 told us.

7 So you could take this down.

8 This is where we are on May 20th. We've had one big —
9 we've had one substantive changed of the defense from 'They told
10 me I wouldn't have to pay' to 'They told me I wouldn't have to
11 pay based on condition subsequent.' We've had Rule 26
12 disclosures, no Nancy. We've had interrogatory response, 'Tell
13 us who has knowledge of the alleged agreement,' no Nancy. We
14 have an interrogatory response where Mr. Dondero says that he
15 made the agreement. And so we have this hearing on the 20th and
16 it's got to be a little humiliating, right. Everybody's got to
17 know this isn't going well. And so what happens? He goes back
18 to the office, he meets with his lawyers, and the next week they
19 amended Rule 26 responses, they amend their discovery responses
20 to add Nancy Dondero, and Mr. Dondero testifies on May 28th.
21 This is all record, it's part of Mr. Dondero's transcript.

22 This is how the sausage is made, Your Honor. You
23 thought that this defense was probably like, yeah, this has been
24 the defense. It hasn't been the defense, it has changed. How
25 is Mr. Dondero and Nancy Dondero going to stand up in front of a

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1 jury and explain this? Because here is one last fact. Some
2 time after May 28th, after all of this happened, after they come
3 up with the Nancy Dondero story, right, his sister, that's when
4 NexPoint, HCMS, and HCRE adopt the same defense. And that, in
5 conjunction with the withdrawal of the reference, I don't have
6 to remind Your Honor this is what's happening in June of 2021,
7 where we finally just say, fine, withdraw the reference subject
8 to the report and recommendation until – until the cases are
9 trial ready, let's consolidate for discovery purposes, and we
10 proceed from there because now four of the five defendants are
11 adopting the same defense. That's how the sausage is made, Your
12 Honor. It's not pretty. But as you consider how to fashion
13 your report and recommendation, the debtor urges you to take
14 into account the changing nature of the story and the fact that
15 Mr. Dondero three times forgot his sister and said, 'I entered
16 the agreement on behalf of the debtor.' And it's only after
17 that humiliating presentation on May 20th that they come up with
18 the new Nancy Dondero defense. That's when it happens, that's
19 the time line.

20 Let's go to the next slide, please.

21 Mr. Dondero is also going to have to explain on behalf
22 of himself and NexPoint and HCRE and HCMS why he always acted
23 against his own self-interest. Because, as I said, according to
24 Mr. Dondero's expert, he only earned \$1.7 million over the three
25 years during which \$70 million of notes became subject to these

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1 agreements, approximately 40 times his compensation. He's going
2 to have to explain to the jury the following seven, he's going
3 to have to provide an explanation for the following seven
4 undisputed facts. Right, they don't address any of these, but
5 he's going to have to explain every single one. And we ask the
6 Court to consider what's a jury likely to think when they get
7 questions about this.

8 Mr. Dondero and Mrs. Dondero are going to have to
9 explain why they didn't tell anybody about the alleged
10 agreements. And for this purpose, for this very limited purpose
11 I'll just limit it at the time they were executed, at the time
12 they allegedly were entered into. There's no facts, there will
13 never be any facts. It's contradicted by their discovery
14 responses if they try to claim now that they told no one about
15 any of these alleged agreements at the time they were entered.
16 Nancy Dondero was clear that she never told anybody in the
17 history of the world prior to the commencement of this lawsuit
18 about this. And Mr. Dondero says only, claims only that he told
19 Frank Waterhouse, but the evidence speaks for itself. He never
20 told Frank Waterhouse, he never used the word agreement, he
21 never used the word Nancy, he never used the word Dugaboy, he
22 never used condition subsequent, he never talked about
23 forgiveness. He just said, hey, that's part of my compensation.
24 And he said it in the context of settlement discussions, right,
25 negotiations. We've heard that word recently.

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1 How come you didn't tell anybody, Mr. Dondero?
2 Wouldn't it have been in your interest to do that. How come you
3 didn't tell PWC? Wouldn't it have been in your interests to
4 tell your auditors, 'Hey, I've got these agreements. You may
5 not want to – you may not want to value the note at a hundred
6 percent because there's a really good chance they might be
7 forgiven.' But he never told PWC, even though disclosure was
8 unambiguously required, facts not in dispute, and I'll talk
9 about that more for just a moment shortly. No dispute that
10 there's no writing that exists that memorialized the terms of
11 the alleged agreements. How does somebody enter into an
12 agreement for the forgiveness of 40 times your compensation and
13 not send a confirmatory email, not have your board adopt
14 resolutions approving it, not summarize your terms somewhere so
15 that you have a definitive writing so that nobody forgets
16 because there's dozens of promissory notes that are allegedly
17 subject to these myriad agreements? Didn't put anything in
18 writing.

19 How is he going to explain to the jury that under his
20 watch Highland time and time and time again filed monthly
21 operating reports and schedules of assets that included all of
22 these notes at a hundred percent, right, disclosures made to
23 this Court, no dispute that Frank Waterhouse prepared him, his
24 signature is on them, sometimes electronic, by the way, you
25 know, there's a heresy against electronic signature, but if you

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1 look at his signature, it's plainly electronic most if not all
2 the time. Even in October and November and December, when Jim
3 Dondero was fully in control of the enterprise, all of these
4 notes are disclosed as assets of the estate. How is he going to
5 explain that to the jury?

6 And the interesting thing, Your Honor, is if you look
7 – I don't remember the exhibit number and I hate to burden the
8 Court, but if you look at some of the monthly operating reports
9 where they discuss – I think it's the operating reports and not
10 the schedules – at the value of the notes, there is actually a
11 footnote that puts the world on notice that the Hunter Mountain
12 note is likely not collectable. So all of Highland's creditors
13 at least one notice that Hunter Mountain may not be collectable,
14 but there's no disclosure of any kind about these alleged
15 agreements even though it would have been in Mr. Dondero's
16 self-interest to put it in there.

17 We made demands – it's in the record – we made demands
18 for a full payment under the demand notes on December 3rd, 2020.
19 Wouldn't it have been in Mr. Dondero's self-interest to say,
20 'Wait, wait, wait, what are you talking about, I had these
21 agreements with my sister. Let me tell you about them.' Right?
22 It would have been in his interest to do that at that time, but
23 he didn't. He didn't say anything.

24 We had a confirmation hearing. And Mr. Dondero and
25 the advisors and Dugaboy, and I can't remember how many entities

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1 filed their objections to confirmation. And they come up with
2 every single argument, absolute priority rule, 2015.3. I mean
3 they come up with every single argument. I've skipped number 6.
4 I'll come back to that in a second – actually, no, it is number
5 6. They come up with every single argument. And you know the
6 one argument that they don't come up with, kind of weird, those
7 notes that your projections show are assumed to be collected in
8 2021, there's no objection that that projection is unreasonable.
9 There's no objection that that projection is unreliable.
10 There's no statement that Highland has it all wrong. It's
11 assumption letter C to the projections to the – that were
12 attached as part of, I think, the disclosure statement. And
13 then they were amended on the eve of trial, because by that time
14 we had already commenced the lawsuits. So they were amended on
15 the eve of trial to add the term notes.

16 We get to confirmation hearing. Mr. Dondero's lawyer
17 very diligently cross-examines Mr. Seery. There's questions
18 about the notes. There is oral argument about the notes.
19 Wouldn't that have been a good time to say, 'Hey, wait a minute,
20 I've got this agreement with my sister.'

21 None of this ever happened. And I think this is just
22 such devastating facts, Your Honor, on slide 6 because they
23 ignore it all because they can't dispute any of it, they just
24 can't. And you're going to have to put yourself in the position
25 of a juror, you're going to ask a jury, are you going to

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1 recommend to Judge Starr that he seek a jury so that they can
2 have me cross-examine Mr. Dondero and Ms. Dondero about why they
3 failed to act in their own self-interest on all these occasions.
4 I think that would be a waste of time to pursue.

5 Can we go to the next slide, please?

6 So I mentioned that Mr. Dondero had the obligation to
7 disclose this alleged agreement or the alleged agreements with
8 his sister. He's a CPA. You know if he was a compliant
9 executive or if he was part of a compliant organization, he
10 would have stood by the representations that he made to PWC in
11 connection with the audit for the period ending December 18th,
12 2018, but he did not. He made no disclosure of these agreements
13 with his sister. And what his singular defense to his failure
14 to disclose is: They weren't material.

15 Mr. Dondero should no better. If he was really
16 compliant, he would know that he doesn't decide what's material,
17 the auditors decide what's material. And the audit letter that
18 he signed, that's Exhibit 33, specifically said materiality is
19 \$1.7 million.

20 In our moving papers, Your Honor, we cited to probably
21 five or six different representations that Mr. Dondero and Mr.
22 Waterhouse made to PWC. I'm only going to focus on two here,
23 but I'm not – I don't want to take the time to repeat everything
24 that's in our brief. I'm just highlighting a few things here.

25 Number 11, representation. Number 11 that Mr. Dondero

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1 made, receivables recorded in the consolidated financial
2 statements represent bonafide claims against the debtors for
3 transactions, right, so that's one.

4 But 36 is just the killer: We have disclosed to you
5 the identity of the partnerships, related parties, and all the
6 related party relationships, and transactions of which are
7 aware. And the interesting thing about this is, Your Honor,
8 related party transactions are so critical to an auditor's work
9 that it's not even subject to the materiality level.

10 If you take a look at Exhibit 33, on the first page
11 where it discusses materiality, it makes it clear that
12 materiality only applies to those representations where the
13 phrase is used. The phrase materiality is not even used for
14 related party transactions. If Mr. Dondero and his sister
15 entered into agreement for \$25, according to Representation
16 Number 36 that would have to be disclosed. There is no
17 disclosure. Mr. Dondero was a CPA. Mr. Waterhouse is a CPA.
18 They made these representations to the auditors. And if these
19 agreements actually exist, then their financial statements,
20 their audited financial statements are materially misleading.
21 It's one or the other. I think it's the former myself, but
22 that's for you to decide as the judge.

23 You know we made an argument in our papers, in our
24 moving papers and we made the argument again in reply that there
25 is no basis under the partnership agreement for Dugaboy to act

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1 in the way that Mr. Dondero contends that he did. And I don't
2 want to spend a lot of time on it, Your Honor. You have the
3 partnership agreement. It's Section 3. It is a 100-percent
4 legal issue, but we do not believe that Dugaboy even had the
5 authority to do what they now contend it did. And we hope that
6 – I didn't prepare a slide on that – but we hope that Your Honor
7 will look at that if the Court deems it necessary, because
8 that's an issue that we raised and that we're raising again.

9 Let's go to the next slide.

10 So even if you think that perhaps jury should hear
11 this story, should hear how the sausage was made, should hear
12 Mr. Dondero explain why seven different occasions he failed to
13 act in his own self-interest, the undisputed evidence shows that
14 the alleged agreements would nevertheless be unenforceable due
15 to a complete lack of consideration. Your Honor, if you've read
16 the papers you know that there's two ways under the alleged
17 agreement that the condition could be met. One is if certain
18 portfolio companies were sold for greater than cost. So if Mr.
19 Dondero was in control and certain portfolio companies were sold
20 for greater than cost, \$70 million of notes would magically be
21 forgiven.

22 This contingency doesn't apply because Mr. Dondero
23 hasn't sold any of the portfolio companies. And we did note in
24 our motion papers that he sold a substantial portion of MGM, one
25 of the three so-called portfolio companies, back in November

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1 2019, not to suggest that he would have been entitled to
2 forgiveness as a result but to point out, and I could have added
3 it to the prior slide, that would be opportunity number 8, when
4 Mr. Dondero was specifically engaged in the transaction that
5 took Court time, that involved discussions and negotiations with
6 the creditors committee, that might have been another
7 opportunity for him to say, 'You know what, if I sell more of
8 this, I'm out, and you guys – all those notes are going to be
9 forgiven,' but he didn't take advantage of that then either.

10 But here's the deal, Mr. Dondero and Nancy say, fee,
11 the consideration that was given in exchange for this condition
12 subsequent agreement is that it would cause the, quote, utmost
13 focus and attention for Mr. Dondero. It would incentivize him,
14 I think –

15 (The Court's audio volume greatly decreased at 1:00 p.m.:)

16 THE COURT: Mr. Morris, if you can hear me, you're
17 frozen.

18 Are anyone else experiencing the same thing?

19 (The Court and staff confer.)

20 THE COURT: (Tapping microphone.) Uh-oh. Okay. If
21 any lawyers out there can hear me, would you speak up? (Tapping
22 microphone.) (Conferring with staff.)

23 Power the microphone up here.

24 I don't know if they can see me. Whoops, everything
25 just went off.

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1 THE LAW CLERK: I think our whole system went out. I
2 think they logged me out of it.

3 THE REPORTER: Hey, I need you up here real quick.
4 Our system just went down again. Okay.

5 (Back on the record at 1:10 p.m.)

6 THE COURT: Hey, this is Judge Jernigan.

7 MR. MORRIS: Yes, I can, Your Honor.

8 THE COURT: All right. Maybe we're up and running
9 again.

10 MR. MORRIS: How much time have I spent? I don't know
11 if the Court is keeping track.

12 THE COURT: About 34 minutes.

13 All right. So we lost you, we – you were –

14 MR. MORRIS: Okay, I know where –

15 THE COURT: – talking about the contingency, the sale
16 contingency that won't happen.

17 MR. MORRIS: Right.

18 THE COURT: And then I think you were about to talk
19 about the third-party contingency.

20 We've got an IT person in here –

21 MR. MORRIS: Right.

22 THE COURT: – so if we have other problems, hopefully
23 we can quickly nip in the bud.

24 All right. You may proceed.

25 MR. MORRIS: Okay. Thank you, Your Honor.

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1 So, look, Mr. Dondero and his sister tried to say that
2 the consideration Highland was going to get was that he would
3 incentivize, that he would work particularly hard, that he would
4 be motivated, but here is the thing. The evidence, the
5 uncontroverted, indisputable evidence is that Mr. Dondero
6 testified very clearly that on the day each of the agreements
7 was entered into, the portfolio companies were already either
8 substantially or at least moderately higher than cost, meaning
9 that there was nothing to incent.

10 They also claim, the other piece of it is that somehow
11 Highland benefitted because they didn't have to pay salary. I
12 don't see how that makes sense, as we argued in our papers, they
13 still have to part with the capital. And what Highland was
14 actually deprived of was the opportunity to charge that payment
15 as an expense in order to reduce income. It allowed Mr. Dondero
16 to defer the payment of taxes, but it harmed, actually harmed
17 Highland because Highland had to pay the money, whether it was
18 compensation or in form of the loan, they still are out the 70
19 million – they're still out the capital that they lent to Mr.
20 Dondero.

21 But here is the thing, none of it matters because that
22 contingency doesn't apply. The one that would apply, if these
23 alleged agreements actually existed, which we do not believe the
24 evidence supports, it would apply because the portfolio
25 companies are now going to be sold by, you know, Mr. Seery or

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1 whatever successor may come along some day, not that I'm
2 anticipating that. But it's not going to be sold by Mr.
3 Dondero; that's what we do know.

4 You know we have cited the evidence in the record, we
5 have cited the deposition testimony. I asked Ms. Dondero, who
6 entered, allegedly entered into the agreement on behalf of the
7 debtor, what's in it for Highland, what does Highland get if Mr.
8 Seery sells the assets instead of Mr. Dondero, because Mr. Seery
9 is not motivated to do this, right, he's not getting the pile of
10 money at the end, and her answer –

11 (Tones.)

12 MR. MORRIS: – and so we don't think there is any
13 basis. We think the whole thing is manufactured. I'll use the
14 small f fraud. We think that the evidence shows how the sausage
15 was made. There is no explanation for any of these undisputed
16 facts, but even if there were there is absolutely no
17 consideration paid to the debtor.

18 Let's move onto HCMFA's defense. HCMFA, as we talked
19 about earlier, contends that the notes were issued by mistake
20 and without authority. I'll remind the Court of undisputed
21 facts that I think HCMFA sometimes either ignores or forgets,
22 and that is Frank Waterhouse was an officer of HCMFA. Frank
23 Waterhouse was the treasurer. Frank Waterhouse's responsibility
24 as the treasurer was among the responsibilities, and there is no
25 dispute, I think Mr. Norris testified to this, it's in our

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1 papers, was accounting and finance. He was a fiduciary. No
2 dispute about any of these things.

3 And we're here on this slide to show the Court the
4 emails, the contemporaneous emails, because we rely on evidence
5 to support our position, and the contemporaneous evidence from
6 May 2nd and May 3rd, the day that these notes were executed,
7 shows exactly what was happening. And this is not a surprise to
8 Mr. Waterhouse, right. The reason that he's not surprised is
9 because he's participating in all of this. And he's
10 participating in all of this, how do we know that, because again
11 no dispute, these emails are sent to corporate accounting.
12 Corporate accounting is an email string that includes Mr.
13 Waterhouse. No dispute about that.

14 Now I will tell you, Your Honor, that if we ever got
15 to a jury, we'd put Ms. Hendrix on the stand. Ms. Hendrix and
16 Mr. Klos would both testify, I think they did in their
17 depositions, that they would never make transactions of this
18 type without the approval of Mr. Dondero or Mr. Waterhouse, that
19 Mr. Waterhouse gave the instructions. But do not have to go
20 that far. You don't have to resolve what the nature of the
21 instruction was because these documents –

22 (Tones.)

23 MR. MORRIS: – that Frank Waterhouse, the fiduciary,
24 the treasurer, the officer, the man responsible for accounting
25 and finance was told contemporaneously that these transfers were

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1 going to be booked as loans and that the accounting department
2 was going to prepare the notes. This is what he's told. It's
3 why he – it's why in none of that long deposition, in none of
4 Mr. Sauter's declarations is there anything where Frank
5 Waterhouse says, 'I had no idea.' That's what a mutual mistake
6 would be. That's not the contention. There's no evidence to
7 support that.

8 If we can go to the next slide.

9 Thirty days later, exactly 30 days later Mr. Dondero
10 and Mr. Waterhouse sign their management representation letters,
11 not just for Highland but for HCMFA. And not only did
12 Highland's audited financial statements include a disclosure
13 about these two notes that were created in May, but HCMFA's own
14 audited financial statements make the same disclosure, and
15 that's up on the screen, Your Honor. It's Exhibit 45.

16 THE COURT: Okay.

17 MR. MORRIS: And they'll say, oh, but Highland,
18 Highland employees prepared it. At what point does that refrain
19 become completely untenable? I thought it did like months ago,
20 but for them to say that now when only Mr. Waterhouse and Mr.
21 Dondero signed management representation letters did they do any
22 due diligence, how are they going to explain to a jury that Dave
23 Klos and Kristen Hendrix somehow securely conspired to stick
24 into these pesky, little audited financial statements this
25 disclosure? How is a compliant company and a compliant

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1 executive going to stand before a jury and say that he didn't
2 read this, that he didn't know? I don't think so.

3 Let's go to the next slide, please.

4 THE COURT: All right.

5 MR. MORRIS: The evidence that Mr. —

6 THE COURT: I — I no longer have on my screen your
7 slides. I have a hard copy, but is it just me or everyone —

8 MR. MORRIS: Okay. It seems to be up on my screen,
9 for whatever that's worth.

10 Ms. Deitsch-Perez, Mr. Rukavina, do you — I mean you
11 guys have hard copies too.

12 MS. DEITSCH-PEREZ: It's up on the screen. Maybe
13 what —

14 MR. RUKAVINA: Yeah, I see it. I see it too.

15 MS. DEITSCH-PEREZ: Maybe pull it down put it back up
16 again for the Judge.

17 MR. MORRIS: Okay, we can try that.

18 La Asia, can you do that, please?

19 THE COURT: Okay, I got it now.

20 MR. MORRIS: Okay. So we're on slide 11. And, again,
21 we're talking about HCMFA's allegation that the notes were
22 signed by mistake or without authority or, you know, whatever
23 the defense is. But the evidence that Mr. Waterhouse is fully
24 engaged is overwhelming. And what the Court would have to find
25 is that some reasonable jury somewhere is going to accept Mr.

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1 Waterhouse's testimony on the following points. And remember
2 back on the motion to strike, I pointed out to step one in
3 HCMFA's motion for leave to amend because it said that Mr.
4 Waterhouse wasn't told to treat the transfers as a loan, he was
5 only told to make the transfer. Well, that cuts against him.
6 It doesn't cut for them. And it cuts against them because there
7 is no dispute, there will be no evidence that Mr. Waterhouse was
8 instructed to treat the transfers as compensation. So Mr.
9 Dondero has nobody to blame but himself because he didn't make
10 it clear to Mr. Waterhouse. And Mr. Waterhouse did what Mr.
11 Waterhouse does: He is the financial officer, he is the
12 fiduciary for HCMFA and for Highland. He is in charge of
13 accounting and finance. And he was told to transfer money.
14 That's all he was told. So there can't be a mutual mistake if
15 Mr. Waterhouse was never told 'Transfer the money as
16 compensation.' There will be no evidence that Mr. Waterhouse
17 was confused, that he – he heard the direction to treat it as
18 compensation and it was mistakenly treated as a loan. There
19 will be no evidence that Mr. Dondero gave a specific instruction
20 to treat this as a loan.

21 And it's in our papers. I don't have it on the
22 screen, Your Honor. If you look at the contemporaneous
23 documentation that the advisors prepared and sent to their
24 clients, it was the advisors and Houlihan Lokey who did the
25 evaluation. There is not even a document that supports the

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1 notion that Highland was at fault. You have a lot of testimony
2 about it. You have a lot of conclusory allegations. I don't
3 think there is a single document that you're going to see where
4 somebody said that Highland is at fault.

5 The books and records, right, if we can go to the next
6 bullet point, that's what we just saw. Not the next slide, stay
7 on slide 11. That's what we just saw, the second bullet point
8 refers to the two emails that we saw that were sent to Mr.
9 Waterhouse. Again, we think if we got to a jury, the evidence
10 is going to show that Mr. Klos and Ms. Hendrix are very able and
11 – and decent employees and they followed the rules, and they're
12 going to testify that this is what Mr. Waterhouse told them to
13 do. But, again, they don't have to reach that far. We saw the
14 emails.

15 I want to point the Court to just two other pieces of
16 evidence that I didn't put up on the slide, but if you take a
17 look at Exhibit 53, Your Honor, perhaps when this is over you
18 will see Mr. Waterhouse participating in the discussions on May
19 2nd about the \$2.4 million and that the payment has to come from
20 HCMFA. And then if you look at Exhibit 85, which is another one
21 of Mr. Dondero's written responses to the discovery, and the
22 important point here is I hear Mr. Rukavina saying it has to go
23 through Legal, it has to go through Legal, it has to go through
24 Legal. Well, that's not what Mr. Dondero says.

25 Okay, we asked Mr. Dondero to, in Interrogatory Number

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1 2, and this is at Exhibit 85, to identify, among other things,
2 the person who drafted the note. And he responded, and I'm
3 quoting: Dondero does not know who specifically drafted the
4 notes. However, he believes they were drafted by an individual
5 in either the Highland Legal or Finance Department. So it's not
6 crazy to Mr. Dondero that somebody in the Finance Department
7 would draft the notes, right, it's just not. The fact is that
8 Mr. Waterhouse knew the notes were prepared because the
9 transfers were booked as liabilities on HCMFA's books and
10 records.

11 Is Mr. Waterhouse going to be able to explain to the
12 jury either that he didn't know this or that he did it by
13 mistake? Right. And this whole notion of mistake – well, we'll
14 get to it in a moment.

15 So the transfers are booked on HCMFA's balance sheet
16 as liabilities. Mr. Waterhouse and Mr. Dondero signed
17 management representations, and the notes appear as a subsequent
18 event in the audited financials for the period ending December
19 31st, 2018. Relying on those very books and records, and this
20 is in our papers, the advisors, not Highland, this is Mr.
21 Waterhouse, this is Ms. Stedford (phonetic), Mr. Norris is on
22 here, I think Mr. Sauter, I don't have the emails in front of me
23 but they're well cited in our papers, they take the HCMFA books
24 and records and they send it to the retail board. Right, so
25 HCMFA actually relied on the books and records to report to the

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1 retail board as to what they owed Highland, and it included
2 these notes.

3 I think step six of Mr. — I tell you I could go
4 through Mr. Rukavina's six-step process and deal with all of it,
5 but — but I think his — I think his last step is that there were
6 notes on the books for \$6 million, and these notes are about \$7
7 million, so people can be confused. I think the phrase he used
8 was people would naturally assume that they were the same thing.
9 I'd like to be in front of a jury and ask the jury if they would
10 have any trouble distinguishing between \$6 million and \$7
11 million. I think a jury of ordinary citizens might say that
12 million dollars would make a difference. But be that as it may,
13 here is the important thing, Your Honor. In every single
14 disclosure after these notes are signed, it's not \$6 million or
15 \$7 million, it's always eight figures, it's \$10 or more. It's
16 \$10 million or more to the retail board. It's \$10 million or
17 more in every single monthly operating report. It's \$10 million
18 or more in the schedules. There is no way to confuse 6,- and
19 7,-, even if that was reasonable, because that never occurred.
20 The number was always 10 million or 12 million. So that's just
21 another specious argument as opposed to facts. It's just
22 argument. And we know the Court will distinguish argument from
23 facts.

24 Mr. Waterhouse is the person who prepared HCMLP's
25 monthly operating reports and schedules that included the HCMFA

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1 notes as assets. How is he going to explain to a jury how he
2 did that two dozen times? And, by the way, what position does
3 that leave him in having prepared them and signed them and filed
4 them with the Court. Now they're false, even though the entire
5 bankruptcy estate relied on the accuracy of those reports. Not
6 a material error, if they're to be believed.

7 Then of course you have Mr. Sauter's investigation,
8 right? He comes in in the spring of 2021, completely
9 unfettered. Mr. Waterhouse is no longer employed by Highland.
10 There's no lawyer telling Mr. Waterhouse he can't speak. They
11 meet three times. Three times. And Mr. Waterhouse refuses to
12 accept responsibility for this. He refuses to say that he made
13 a mistake. Mr. Sauter, who has no personal knowledge, we've
14 heard this story before, comes in after the fact with no
15 personal knowledge and announces that Frank made a mistake, but
16 that's not what Frank said.

17 If you look – if you look at the transcript, if you
18 look at the transcript of Mr. Norris, right, I got him to admit
19 and then I got Mr. Sauter to admit based on that transcript that
20 Mr. Waterhouse was crystal clear, he knew exactly why the notes
21 were created. He knew exactly why the notes were created. I
22 don't know how they're going to explain that to a jury.

23 Let's move to the next slide, a couple of other – the
24 special arguments, Mr. Waterhouse was not authorized to sign the
25 HCMFA notes. Let me get this right, Your Honor. He was an

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1 officer of HCMFA. He was the treasurer of HCMFA. He was a
2 fiduciary. He was the person responsible for accounting and
3 finance, and they say he wasn't authorized. Other than the
4 words out of Mr. Dondero's mouth, what evidence is there to
5 support that? Not only is there no evidence to support it, but
6 it is directly contradicted by everything we heard last week.

7 Mr. Dondero – Mr. Waterhouse signed agreement after
8 agreement after agreement on behalf of not only HCMFA but on
9 behalf of Highland. He signed shared services agreements, one
10 of which is in evidence in this case. He signed subadvisory
11 agreements. He signed payroll reimbursement agreements,
12 agreements that Mr. – that not only did Mr. Waterhouse sign but
13 that HCMFA is somehow trying to collect money on. How is it?
14 Where is the evidence that says Frank Waterhouse is – and I
15 don't have to remind the Court that Mr. Dondero didn't know
16 anything about anything – where is the evidence in the record
17 that shows that Mr. Waterhouse could sign all of those
18 agreements but he couldn't sign these promissory notes? Those
19 agreements, by the way, that required HCMFA and NexPoint to pay
20 a multiple of the promissory notes at issue, so it can't be the
21 amount. I mean there's no evidence of any kind, frankly, that
22 his wings were clipped by Mr. Dondero.

23 He also signed other notes, so it can't be he's not
24 allowed to sign a promissory note because there are other notes
25 in this case that Mr. Waterhouse signed that they don't dispute

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1 his ability to sign. So we think the whole idea and apparent
2 authority, I mean there is no evidence for the notion and it's
3 contradicted by the evidence.

4 They also say, ah-ha, ah-ha, Mr. Waterhouse's title or
5 – or the HCMFA name at the bottom isn't clearly articulated.
6 Again, Your Honor, they are grasping at straws. The undisputed
7 facts, if you look at the notes that Mr. – that have Mr.
8 Waterhouse's signature, and I'll leave it that way, because
9 that's all I think we have to prove is that his signature is on
10 it, he is an officer and that he was – that he had at least
11 apparent authority to enter into these agreements, that he knew
12 about them, that it's not a surprise to him, he doesn't contend
13 that he didn't know what was happening, right. None of that is
14 going to be in the record here.

15 So they say, ah, ah, Mr. Waterhouse, it just says
16 maker. But here's the thing, if you look at the notes, Your
17 Honor, obviously maker is a defined term. The definition of
18 maker is HCMFA. Mr. Waterhouse's electronic signature is used
19 for other notes in the same way without dispute. Mr. Dondero,
20 as we just looked at, on Exhibit 85 has admitted that Highland's
21 Accounting group is authorized to prepare notes, right,
22 otherwise he wouldn't have submitted that interrogatory
23 response. Based on the audited financials, the books and
24 records, the statements to the retail board, the uninterrupted
25 string of bankruptcy filings prepared and signed by Mr.

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1 Waterhouse, I mean I don't think there is any basis for the
2 argument, but it's they should be estopped today from coming in
3 and denying the enforceability of these notes.

4 Let's move to the next defense, is breach of shared
5 services. You know somehow HCMS and HCRE have gobbled onto this
6 defense. There is no shared services agreement in the record.
7 There is no shared service agreements in the record. There is
8 no competent evidence that shows that is shared services
9 agreement exists. I think if Your Honor were to look at the
10 record and look at my examination of Mr. Dondero, because I
11 asked him about this, he said, you know, they – they – the
12 consideration that Highland received is like a reputational
13 benefit, or something like that. I mean it's just – it's a
14 bunch of nonsense. And there is no evidence in the record that
15 there is a shared services agreement.

16 There is one for NexPoint, no doubt about it. Article
17 2 sets forth very clearly what Highland's duties and
18 responsibilities are. And if you just look at the evidence, not
19 argument, if you just look at the document, I think every single
20 entry begins with the word "Assist" or "Assistance" or "Advice,"
21 or something like that with respect to certain services. To
22 this day, HCMFA – I mean, I'm sorry – the term note defendants
23 have failed to identify any particular provision of the shared
24 services agreement that not only authorized but obligated
25 Highland to make payments on their behalf without any

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1 instruction or direction of any kind by them. According to
2 them, Highland really could have done just about anything to pay
3 any obligation that they felt was due and owing by them. I
4 think it's a ridiculous reading of the agreements. And I'll
5 wait to hear if counsel actually identifies a provision in the
6 NexPoint shared services agreements that they believe not only
7 authorized but obligated Highland to make these payments.

8 If there were any doubt, Your Honor, Section 2.02 of
9 the NexPoint shared services agreement specifically says that
10 for the avoidance of doubt, Highland shall not provide any
11 advice or perform any duties on behalf of NexPoint other than
12 the back and middle of the services contemplated herein. Okay,
13 so if it's not in the agreement, they're prohibited from doing
14 it. Highland followed these provisions in practice throughout
15 the bankruptcy case. Don't take my word for it, take the
16 defendants' evidence.

17 Can we please put up Exhibits D and E. So these are
18 exhibits that are attached, I think, to Mr. Aigen's declaration.
19 And if we could just start at the first – the first email. You
20 will see that it's dated – no, up at – either way, that's fine.
21 Just give me one minute and stop scrolling.

22 So here is an email that was originated by Ms.
23 Hendrix. And this was the practice. And, you know, we heard
24 about this last week. Ms. Hendrix would write to Mr. Waterhouse
25 and she would say, "Here are all the payments that I'm going to

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1 make. Is it okay." And Frank Waterhouse would literally have
2 to approve it. So – so let's scroll up. This is, "Okay to
3 release," she asks.

4 Frank Waterhouse says okay. That's December 23rd.
5 Let's just scroll up and see a few more. Keep going. Keep
6 going. So here's another one. "Okay to send." Right, Kristen
7 Hendrix asking for permission to make payments on behalf of
8 HCMFA, HCMS, right, all of the nondebtor entities wanting
9 permission. Frank says okay.

10 Keep going. This is December 1st. "Okay to release,"
11 she asks Mr. Waterhouse. Ms. Hendrix doing her job. Mr.
12 Waterhouse doing his job. Okay. Right, so their contention
13 that Highland was not only authorized but obligated to make
14 these payments is belied not only by the contractual language
15 but by the undisputed evidence that they have put into the
16 record that shows that Kristen Hendrix always sought Frank's
17 approval before making these payments. That's – that's the
18 facts, and this is December 2020, but there's more. Of course
19 there's more, because there is no dispute that Highland was ever
20 instructed or directed to make these payments at the end of
21 2020. In fact, the evidence is crystal clear, that no payment
22 was made because of Mr. Dondero's direction, right.

23 The Court doesn't have to resolve the debate between,
24 you know, Mr. – you know, Mr. Waterhouse and Mr. – it wasn't
25 made because he said so. And here is the funny thing. We have

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1 put it in our reply papers, Your Honor, it's Highland actually
2 believed that it had not only the authority but the obligation
3 to make payments on behalf of these entities. Highland surely
4 would have paid itself on all the demand notes, right? Is there
5 any reason why it wouldn't have paid itself on December 10th,
6 when Mr. Dondero failed to respond to all of the demand letters?
7 Right, HCMS has all these demand notes. HCRE has all these
8 demand notes. Why didn't Highland just pay itself?

9 Can you imagine what Mr. Dondero had done if he woke
10 up on the morning of December 11th and he found out that
11 Highland had helped itself to all of these nondebtor affiliates'
12 cash because he didn't respond to the demand letters? How is he
13 going to explain to that jury? He's going to tell the jury
14 that's what he wanted to happen, that's what he expected to
15 happen. It can't just be with the term notes. It's got to be
16 either they had the ability to do it or they didn't. Clearly
17 Highland and Mr. Seery didn't think they had the ability,
18 because if they did, they would have. Right? Why wouldn't
19 they? There is no defense that should be put before the jury on
20 shared services.

21 Let's go to prepayment defense. There is no dispute
22 the terms of the notes are absolutely unambiguous. They
23 required the maker to make an annual installment payment at the
24 end of the year of accrued and unpaid interest, and
25 one-thirtieth, I believe, of the principal.

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1 The term notes also provided that the parties could
2 renegotiate. I think it's paragraph 3, although forgive me if I
3 get that wrong. And it said the maker may prepay in whole or in
4 part the unpaid principal or accrued interest on the notes. Any
5 payment of the interest shall be applied for unpaid accrued
6 interest thereon, and then to unpaid principal here. This is
7 it. Clear and unambiguous. So the parties could agree to do
8 something differently.

9 And, you know, Mr. Klos in his first declaration
10 addresses the NexPoint issue. And, frankly, it's done at the
11 same theory, so no harm, no foul, I guess.

12 And just look at the amortization schedule, Your
13 Honor. There is not a single month where interest doesn't
14 accrue. The last payment made by these entities, these
15 so-called prepayments, was back in 2019, right. Just look at –
16 we just encourage the Court to look at the amortization schedule
17 and ask itself why, based on the contractual language, they
18 could have ever suspected that interest was no longer going to
19 accrue because it was prepaid and eliminated in 2019 and 2020.
20 In fact, you'll see on the amortization schedule in 2019, even
21 though there is enormous payments that are made at the beginning
22 of the year, the term note defendants are still required to make
23 the interest payment that's due at the end of the year, right.
24 They're treated as having prepaid the principal, but interest
25 continued to accrue. Interest always accrues. And so even

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1 under Mr. Dondero's watch, in December 2019, the term note
2 defendants, they do what they're supposed to do, and they make
3 the payments.

4 And the fact that payments were due at the end of 2020
5 wasn't a surprise to anybody. It's not like somebody can
6 credibly come in and say, oh, gee, we didn't know that these
7 payments were due. And how do we know that, Your Honor?
8 Because Highland prepared 13-week forecasts. They were prepared
9 under Mr. Waterhouse's direction. We've put one example before
10 the Court. I think it's Klos Exhibit C. And if you look at his
11 – and this is, you know, the first unobjected to declaration,
12 declaration paragraph 13, Exhibit C. And he explains that all
13 of the payments that were due at the end of 2020 were fully
14 incorporated into the 13-week forecast. So, again, you know,
15 poor Mr. Waterhouse is going to have to explain to adjacent why
16 that he was completely unaware that these payments were due.
17 It's not going to be good.

18 So that's the prepayment defense.

19 And just quickly, Your Honor, ambiguity. You know
20 Your Honor can look at the evidence in the record on this point.
21 We have cited all the places in Mr. Dondero's deposition where
22 he refused to engage on the topic, insisting that he wasn't a
23 lawyer. You know, in fact, Mr. Dondero stated pretty explicitly
24 that he didn't read any of the notes before he signed them, so
25 I'm not sure how the ambiguity now can possibly be a credible

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1 defense because it's not ambiguity that he was even aware of at
2 the time he signed all of the notes except for the handful of
3 notes that Mr. Waterhouse signed. We don't think there is any
4 ambiguity. They haven't pointed to anything meaningful.

5 There is partial performance. You know it's partial
6 performance, Mr. Dondero has admitted to partial performance in
7 response to an interrogatory. And of course in our reply brief,
8 we show that the defendants paid, I think, \$40 million back on
9 these notes and other notes prior to the petition date. So
10 you've got performance. You know there's just not much more to
11 say on this. So unless the Court has any questions, at this
12 point I think I've used approximately an hour and five or an
13 hour and 10 minutes. Can I just get confirmation of that? And
14 then I'll rest and save the downs for rebuttal.

15 THE COURT: All right. Nate, can you confirm?

16 (The Law Clerk confirms off record.)

17 THE COURT: Okay. Nate says an hour and five minutes.

18 All right, we'll take a 10-minute break and come back
19 and hear from the defendants.

20 COURT SECURITY OFFICER: All rise.

21 (Recess taken from 1:40 to 1:51 p.m.)

22 COURT SECURITY OFFICER: All rise.

23 THE COURT: Please be seated. All right, we're back
24 either/or in the Highland note adversaries. I'll hear from the
25 defendants at this time.

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1 All right, can you all hear me?

2 MS. DEITSCH-PEREZ: Yes, Your Honor, I can hear you.

3 MR. ROOT: Yes, Your Honor.

4 THE COURT: Very good. You may proceed, Ms.

5 Deitsch-Perez.

6 MS. DEITSCH-PEREZ: Okay. And I'm going to ask Mr.
7 Aigen to pull up our PowerPoint. I was not aware that Mr.
8 Morris was going to provide them in advance to the Court and the
9 parties, so we have not – we will look at our PowerPoint to make
10 sure all of the notes and comments are out and circulate to them
11 – circulate them to everyone for their records after the
12 argument and after we've made sure to scrub them of our notes, –

13 THE COURT: All right.

14 MS. DEITSCH-PEREZ: – our internal notes. Thank you.

15 THE COURT: Um-hum.

16 MS. DEITSCH-PEREZ: Okay. And if – we have a couple
17 of hitter slides, please. Mike can go to page 3, start on page
18 3.

19 And if you step back here and think about what we just
20 heard, it sounded a lot like a jury argument. It sounded like
21 an opening statement at trial, because that's – that's what it
22 really was, that the debtor doesn't believe Mr. Dondero or
23 anyone related to him or even associated with him, and is
24 counting on the Court feeling the same way. And I think that
25 situation has emboldened lawyers who surely know better to make

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1 a motion for summary judgment on the grounds that the
2 defendants' witnesses and evidence are less credible, less
3 credible than the plaintiff's evidence; and that the inferences
4 to be drawn from the evidence that plaintiff proffers are better
5 than the – and stronger than the inference – inferences from the
6 evidence that the defendants' witnesses bring forward. And
7 those kinds of things are the very factors that bear on whether
8 you win or lose at trial.

9 And if we were hearing about this, about some other
10 set of lawyers in some other case, we'd probably all laugh and
11 say what are they doing, that's a waste of everybody's time to
12 move for summary judgment on which side is more credible than
13 the other, because that's classically an issue for trial, not
14 for a summary judgment motion. So let's see, let's look at the
15 arguments that the defendants make and the evidence and the case
16 and what plaintiff argues about it.

17 So one thing that the defendants argue is that the
18 agreements don't exist; but, in fact, Jim Dondero and Nancy
19 Dondero, both sides testified that they exist. They identify
20 the essential terms.

21 The debtor makes a big deal about the agreement
22 supposedly being secret; we'll see how they weren't.

23 The debtor makes a big deal about the absence of
24 notice of possible forgiveness on the financial statements.
25 That's not a basis for summary judgment. Might be an

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1 impeachment point at trial, not summary judgment.

2 The debtor talks about voluntary payments, we'll
3 address that. That's not a basis for summary judgment.

4 We heard Mr. Morris talk about the fact that Jim
5 didn't demand forgiveness when there was a relatively small
6 stock sale that was – that was basically forced. He didn't make
7 a demand maybe he could have made; that's not a basis for
8 summary judgment.

9 Whether or not Nancy Dondero looked at the notes when
10 she entered into agreement, that's maybe – maybe an impeachment
11 point at trial, not a basis for summary judgment.

12 And there's evidence that agreements to forgive loans
13 as part of compensation on the occurrence of future events like
14 performance was a practice at Highland and related companies.

15 Defendants also talk about whether the agreements are
16 definite. Not much – we'll see the cases, not much is required
17 for agreements to be sufficiently definite to preclude summary
18 judgment.

19 And – and the argument that Mr. – that the plaintiff
20 makes that the agreements are not supporting by a meeting of the
21 mind – a meeting of the minds, that's really the same thing as
22 arguing that there's no agreement. And those are inherently
23 fact issues. And there are actually cases on that. And you
24 will see there was a complete absence of authority in Mr.
25 Morris' presentation.

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1 So let's go on to the next slide.

2 Okay. We'll discuss the argument about consideration.
3 Conspicuously absent from Mr. Morris' presentation was the
4 second form of consideration that existed for the agreements,
5 which was that Mr. Dondero could have taken more compensation.
6 These agreements were made at comp time, and he was sitting back
7 and looking over his compensation and saying should I take more,
8 I could take more, I would take more. But instead he got this
9 agreement. That's compensation.

10 There's a half-hearted argument in the briefs, not
11 much made of it today by the plaintiff, that Nancy Dondero was
12 incompetent. You will hear from the defendants the law on what
13 constitutes someone who is incompetent to make a contract. And
14 plaintiff hasn't put in anything in support to show that Ms.
15 Dondero was drunk or a minor or otherwise legally incompetent to
16 make agreements.

17 And then you'll hear somewhat from me and more from
18 Mr. Rukavina that Highland was responsible for making the loan
19 payments under the shared services agreement. The plaintiff
20 doesn't deny that there was a written shared services agreement
21 for NexPoint. And then says, well, there's no shared services
22 agreement for HCRE and HCMS, as if it were the law that the
23 agreements couldn't be oral or implied over a course of conduct.
24 And that's a very unlawyerly suggestion. Of course we all know
25 that the agreement need not be in writing and could even be

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1 implied from a course of conduct. And the same thing about the
2 prepayment argument. All Your Honor has to do is look at the
3 amortization tables and see how much was paid on these loans.
4 Huge amounts. And so is it fair to say they were in default at
5 that time when, A, Highland could have/should have paid them,
6 and so much had already been paid.

7 So let's go on now to the specifics.

8 Okay. Now before we go further, there's actually some
9 background that's helpful to understanding how – how we actually
10 got in this position. And to understand how these notes and
11 then the agreements for potential forgiveness came about, as I
12 think Mr. Morris and the Court both said, context is important.
13 This Court has often said that, well, Mr. Dondero hasn't come to
14 grips with Highland being in bankruptcy. And that's an
15 interesting thought, because it recognizes that until this
16 bankruptcy, Jim Dondero was the heart and soul of Highland.

17 He and Mr. Okada (phonetic) built it up from very
18 little. And it was something really important to Dallas. It
19 was a financial powerhouse plunk down in the middle of the
20 country. Not in New York or L.A., where people expected those
21 kinds of companies to be. It grew to employ hundreds and it
22 owned portfolio companies that employed thousands. It survived
23 the financial crisis that wiped out much bigger firms. And
24 understanding its culture is important to this case, because it
25 was a culture of compensation based on performance. This was a

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1 culture of compensation based on hard work. It was a culture of
2 growing the business rather than living large.

3 I remember hearing about Highland in the – you know,
4 many years ago where people – outside vendors griping and maybe
5 even some inhouse people griping that – that they had to fly
6 coach because Mr. Dondero flew coach, because he was – he was
7 putting the company first over his own interests. And so even
8 his distractors acknowledged that Mr. Dondero works tirelessly.
9 And, more importantly, he took ownership and responsibility.
10 And because he was the largest owner, that played a part in how
11 he interacted with the company.

12 So not to get too far ahead of the program, for
13 example, the debtor claims that Mr. Dondero – the fact that Mr.
14 Dondero made payments on notes that were unnecessary, because of
15 the potential forgiveness based on the agreement, that must mean
16 that the agreement didn't exist. But they're missing the point.
17 That's because – that's assuming that Mr. Dondero would only do
18 what was good for himself and not for the company. Instead, if
19 Highland did cash, he'd make payments on those demand loans even
20 though if they weren't demanded payment wasn't due. The same
21 thing about the terms loans. There was only a certain amount
22 due each year. But you saw that much more than that was
23 occasionally paid. And, A, they didn't have to – on the demand
24 notes, they didn't have to be paid because they were subject to
25 the forgiveness, but he still board – caused them to be paid, or

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1 the ones that were his own, he paid them down. Why? Because he
2 wanted to make sure the enterprise was successful.

3 So when you hear Mr. Morris say, well, how does Mr. —
4 how is Mr. Dondero going to explain that he didn't act in his
5 own self-interest, that's the answer. That's the answer. He —
6 he did things he wasn't required to do to make sure that
7 Highland was okay. And if it needed the money, he paid it down.
8 So that is in evidence that the agreement didn't exist. It's
9 evidence that he was putting Highland first.

10 And it's also important to remember that at all
11 relevant times the loans here were modest in relation to the
12 overall value of Highland. If this bankruptcy hadn't been beset
13 by all of the contentiousness that the Court and Mr. Morris have
14 acknowledged by creditors with very personal agendas, by the
15 sharp animosity between the various constituents, by claims
16 trading that maybe skewed the economic interests here, Mr.
17 Dondero expected that he was going to be able to put together a
18 plan that would enable Highland to stay in business, that would
19 pay off all the creditors and move forward.

20 And so when you look at all of the — the argument that
21 Mr. Morris made about sausage-making and why in this sort of
22 really crisis period of the plan being propounded, negotiations
23 over whether it would be the pot plan or the creditors' plan, or
24 something else, and litigation starting up, and Mr. Morris says,
25 'Oh, look, they kept changing their story. They kept adding

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1 things and amending things.' Well, of course there was quite a
2 bit of chaos. And so did everything get done perfectly? Not at
3 all. But that's an argument to be made to the jury. Should
4 they have known everything on day one and put it all on the
5 first pleading? Well, Mr. Morris can argue that, but the
6 defendants will point out the incredible pressure that everybody
7 was under on what was the real focus at the time, which was
8 trying to salvage Highland and trying to have it be a continuing
9 entity and having to have these competing plans. And the
10 litigation was the by least of it. And so that's the
11 explanation on the sausage-making.

12 And any lawyer who tells you they haven't amended
13 their interrogatory answers or forgotten a witness or forgotten
14 a document and had to put it in later isn't - really isn't -
15 isn't a litigator or is maybe a baby lawyer or just hasn't been
16 working enough, because it happens to all of us and it
17 particularly happens when there are a whole lot of cooks in the
18 kitchen, shall we say. And we'll talk a little bit more about
19 that as we go along.

20 So you also know, I mean the debtor knows and Your
21 Honor knows from presiding over this case that Mr. Dondero did
22 not take the kind of huge bonuses out of Highland that we read
23 about in the newspapers. And we also know that he really was
24 focused on making people perform to get their money.

25 And so, given all of that, how can plaintiff feign

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1 surprise that Mr. Dondero would set himself a challenge, a
2 hurdle, to gain forgiveness of that – of the notes? It just –
3 it really defies belief.

4 And I understand that lawyers put on a show for a jury
5 and that's what Mr. Morris will have to do here, but when you
6 talk about something that's not remotely credible, it's not
7 remotely credible that Highland did not expect that Mr. Dondero
8 would plan that he would try to have tax-efficient compensation
9 and that he would plan that if things would happen that would –
10 would result in – in large – potentially really large payments
11 like we've seen with MGM, that he would be able to benefit from
12 that, along with Highland.

13 So, given all of that, we're not – we're not asking
14 the Court to grant summary judgment for the defendants. We
15 recognize that the debtor disputes the facts alleged by the
16 defendants and that there are facts that need to be decided by a
17 fact finder, and here it's going to be a jury. But by the
18 debtor seeking summary judgment and asking this Court to find
19 facts is just as presumptuous as if the defendants had made the
20 same request. And if the Court granted summary judgment for the
21 defendants, we – we concede it would get reversed. And it is no
22 different that if the Court granted summary judgment on what are
23 hotly disputed issues if it granted summary judgment for the
24 plaintiff. And – and we're going to show you the law, which the
25 plaintiff didn't show you.

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1 So, Mike, if you could go on to the next slide.

2 Okay. We heard Mr. Morris say almost for the first
3 time today that the – that the agreement at issue here wasn't
4 authorized by the LPA. And I have to tell you there is – Mr.
5 Morris contended that's an argument they're making. It's not in
6 the – you can – you can shake the motion for summary judgment
7 and squeeze it like a sponge, that argument won't come out of
8 there. The sole argument is there is – and I think I tied it
9 somewhere later in this slide show – they say something like and
10 it wasn't authorized. There's no case law, no argument, no
11 nothing. There is a sentence.

12 So in contrast to that sentence, look at the LPA
13 itself. The LPA gives Dugaboy the right to approve compensation
14 for the GPA of the GP and the affiliates of the general partner.
15 And there is a provision about compensation. And you have to
16 parse through the agreement. You have to look at what the
17 various words in the section mean. So you have to go look at
18 "affiliate," and you will see that that would related to Mr.
19 Dondero. You have to look at "majority interest," and you can
20 see, if you turn to the page that describes it, that that's
21 Dugaboy. And if you go to Exhibit A, that also reflects that
22 the majority interest is Dugaboy. And then if you go look at
23 the Dugaboy trust documents, you will see that as of – starting
24 as of 2015, Nancy Dondero is the Dugaboy trustee and, therefore,
25 the individual entitled to approve the compensation. That was

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1 in the LPA, going back to 2015. I think it was in there before
2 that. That's — that's Highland's operating agreement. If they
3 didn't want that, that shouldn't have been the operating
4 agreement. But that is the agreement.

5 And if we go on now, it defies belief that the debtor
6 says there's no evidence, because there is evidence. Mr.
7 Dondero testified and Ms. Dondero testified about the agreements
8 and what they were. And we'll look at that as we go along. And
9 the agreement was that the notes would be forgiven if Trustway
10 Cornerstone or MGM sold at above — at or above cost. Mr. Morris
11 made some somewhat confusing assertion that that part of the
12 agreement didn't apply here because it wouldn't be Mr. Dondero
13 doing the selling. There is nothing in the agreement as
14 described that says that. But putting that aside, there is no
15 argument in the motion for summary judgment that supports what
16 Mr. Morris said in today and in a footnote that the indisputable
17 fact is that Ms. Dondero did not have the authority to bind
18 Highland. What we just saw on the prior slide is exactly why
19 Ms. Dondero was the person who could do that.

20 So let's go on to the next slide.

21 Okay. So, again as I said, both Nancy and Jim
22 testified to the agreement. And in Texas, and I'll show you the
23 cases in a minute, even if you had a he said/she said dispute,
24 where one side on a contract — on a contract said, 'I made that
25 contract,' and on the other side the other person said, 'No, I

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1 didn't make that contract,' the testimony of the one person is
2 actually enough to preclude summary judgment. And the reason
3 for that is that the Court is not entitled to evaluate the
4 credibility of the witnesses and the relative weight of the
5 evidence. And there's also no requirement that the contract be
6 in writing.

7 What the debtor points to are facts that the jury
8 might consider in deciding whether there was or wasn't a
9 contract. They might be convinced, they might not be convinced.

10 Let's go on.

11 Okay. So now let's look at the applicable law,
12 something that the debtor did not do with you. We have the In
13 re Palms case. Now that was an actual trial where the court is
14 a the trier of fact on a proof of claim. And one party said
15 there was an oral contract and the owner denied it. The
16 architect said there was a contracted design. The owner said,
17 no, there is not. And the court held that whether there was a
18 meeting of the minds is a question of fact. And even if there
19 was a missing term, that would not be dispositive. So when the
20 debtor says here, 'Oh, not – you know, Mr. Dondero didn't recite
21 every term in his deposition,' that's not dispositive for a few
22 reasons. One, that's only talking about what he could remember
23 at the time. But, two, we're at summary judgment, we're not
24 even at the point of trial. And this case says it's an issue of
25 fact.

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1 And then Fisher versus Blue Cor- – Cross (phonetic)
2 applies the Palms case in a summary judgment and again
3 reiterates that whether or not there is a meeting of minds,
4 that's something for a jury to decide.

5 Bucsany (phonetic) is even closer. There there is a
6 written construction contract that required change orders and
7 for amendments to be in writing. Think of that as the parallel
8 to the note. And then after that there was an oral contract for
9 additional work. And the owner contended that the notion that
10 there was an oral contract was inconsistent with the written
11 contract and that must mean there was no oral agreement or that
12 it was unenforceable. And the fact-finder found that an oral
13 contract for additional work is something a jury could find.

14 Senta Alsud (phonetic), another case that's helpful
15 here. There there was a party that made a loan and also put a
16 downpayment towards a transaction. And the party that wanted to
17 be repaid and wanted the refund of the downpayment moved for
18 summary judgment. And there was, like here, conflicting
19 testimony on whether or not there were conditions on repayment,
20 because that's what at issue here, whether there are conditions
21 to repayment, and there were also issues of a similar issue
22 there on the – on whether or not the downpayment had to be
23 refunded, and the court denied summary judgment because
24 conflicting testimony creates a genuine issue of material
25 disputed fact for trial. And – and that's – that's what we have

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1 here.

2 THE COURT: Let me – let me ask you –

3 MS. DEITSCH-PEREZ: Now –

4 THE COURT: – let me ask you a question, because until
5 you got to this case I was going to ask you do you have any
6 cases where an oral agreement was grounds to avert summary
7 judgment on a suit on a note because, as we all know, you know
8 we said it before, suits on promissory notes are, I think,
9 widely regarded as the simplest kind of lawsuits. There are
10 typically, and they – you know the Fifth Circuit has said they
11 are grist for summary judgment. So I was going to ask you do
12 you have any cases where an oral agreement that was alleged to
13 exist to be a defense to repayment was accepted as grounds to
14 avert summary judgment. So –

15 MS. DEITSCH-PEREZ: Yeah. And – and that's why we
16 gave you these cases. They're not going to be a lot –

17 THE COURT: Well, as best I can tell, none of these
18 cases except maybe Alsud involved a promissory note. Okay,
19 they're contracts.

20 MS. DEITSCH-PEREZ: Yeah.

21 THE COURT: But this one, was it a suit on a
22 promissory note, essentially, that oral amendments –

23 MS. DEITSCH-PEREZ: I mean there was –

24 THE COURT: – were argued and the court said, okay,
25 we'll go to trial?

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1 MS. DEITSCH-PEREZ: Well, it was – it was a case in
2 which there was a loan. And one side said you have to pay it
3 back and the other said, no, there were some conditions on it
4 that were oral. And so it went to trial. And, I apologize, I
5 don't know what happened at trial. But the fact that there
6 aren't many cases like that, Your Honor, is because, you're
7 right, often – often promissory notes are simpler cases, but
8 this is most assuredly not a simple case. And so – I mean this
9 is – you know the notion that you can have an oral agreement, I
10 think laymen are confused by that and there's a prejudice, I
11 think, that people – people think that if it's not in writing,
12 oh, boy, maybe it didn't happen, but particularly in Texas we
13 know – we know that's not true, that oral agreements even for
14 big amounts can be binding. You remember Joe Jamal (phonetic)
15 taught us all that.

16 But even more specifically in a he said/she said
17 dispute, the testimony of one side is enough. And so if we take
18 all the hyperbole and emotion out of this and maybe make this
19 something that seems simpler, let's say I agree to sell my
20 \$10,000 car to Mr. Aigen, if he writes – if he wins 10 motions
21 over the next five years. And I don't tell anyone and he
22 doesn't tell anyone. Well, the fact that we didn't tell anyone
23 about this doesn't mean there's no agreement. It's not even
24 evidence that there is no agreement.

25 Now let's say I also do a financial statement and I

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1 list my car as being worth \$10,000. Is that evidence on which a
2 creditor of mine could get summary judgment that there was no
3 agreement, so they could go and grab the car? Of course not, we
4 wouldn't think so -

5 THE COURT: I guess - I guess what I'm trying to get
6 to here is context matters, this isn't any old contract. This
7 is - you know we start with the prima facie case, that this is -
8 these are promissory notes. It's not a typical -

9 MS. DEITSCH-PEREZ: And it -

10 THE COURT: - it's not just any old breach of contract
11 suit, it's a suit on a note where, you know, is there a note,
12 did the nonmoving party sign the note, is the movant the legal
13 owner or holder of it. And, you know, here's the balance due.
14 And that's considered under the law a prima facie case. Well,
15 you know, again I'm trying to get at do we have any developed
16 law that you can use an oral agreement to defend against this
17 very basic kind of transaction in society. I hate to get
18 melodramatic -

19 MS. DEITSCH-PEREZ: Yes, of course -

20 THE COURT: - I hate to get melodramatic and talk
21 about the slippery slope, but it kind of feels like commerce
22 would come to a screeching halt if every defendant could come in
23 and say, you know, I had an oral agreement with the banker, or
24 whoever, that the note as written -

25 MS. DEITSCH-PEREZ: But - but that was -

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1 THE COURT: – the note as written was not going to be
2 binder. I mean we would never have such –

3 MS. DEITSCH-PEREZ: But there are doctrines, there are
4 legal doctrines that deal with that, and that's why this is such
5 a complex case. I mean that's where a lot of the lender
6 liability were about and were people able to prove a subsequent
7 agreement, and that's allowed. I mean parol – parol evidence is
8 only barred in certain circumstances. Even the debtor doesn't
9 argue that that applies here.

10 So I think we are in open territory where the question
11 is will the trier of fact believe that there was an agreement.
12 And we're going to show you the things – you know, the debtor
13 showed you things to make it appear as though there was an
14 agreement and to convince you there wasn't an agreement, and to
15 say that Mr. Dondero is incredible, and I'm going to go through
16 this now and show you the reasons why you should think it
17 happened and why it made sense and why he did certain things and
18 why the companies did certain things. But those are facts that
19 a jury should listen to and say they either believe it or they
20 don't. And that was the case in many of these lender liability
21 cases where somebody said, 'Wait a minute, the – the bank told
22 me that if I went and I did x, y, and z, they weren't going to
23 call my loan.' And we all know that – that a lot of those cases
24 succeeded because subsequent agreements did occur.

25 THE COURT: Okay. Well, I – this is a subject near

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1 and dear to my heart. I just wrote a 140-something-page opinion
2 on lender liability and I know it's darn hard win with
3 liability.

4 MS. DEITSCH-PEREZ: Um-hum.

5 THE COURT: You usually just kind of look at the
6 agreements –

7 MS. DEITSCH-PEREZ: I know, and – and – and I
8 understand that. And I think that's because of the prejudice
9 that, boy it's in writing, you know, you should be stuck with
10 the writing.

11 But we also all know that in reality, things happen.
12 And so some of those lender liabilities cases were real and
13 people really got hurt when the lender didn't, you know, – made
14 an agreement and then wasn't going to live up to it. And the
15 same thing here, Mr. Dondero could have taken more compensation.
16 It's not – I'm not sure I understand what Mr. Morris was talking
17 about when he was saying the consideration was just that he was
18 going to try harder and that he got the loan. The consideration
19 was the fact that each comp period and each end of year,
20 January, February, he could have – he could have asked and
21 gotten a whomping, big, fat cashed check then. He could have
22 taken more compensation. And instead of taking more
23 compensation at the time, he said, you know what, I'm going to
24 take it on the come, I'm going to get this agreement to make my
25 loans potentially forgivable if good things happen, instead of

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1 taking cash out now.

2 He could have had unconditional cash as his
3 compensation. And instead, he took these agreements. And so
4 now the debtor wants to take it because and, you know, after he
5 forewent taking his compensation, they're going to say, 'Ha, you
6 can't have your other compensation either.'

7 And it's not like this was a sure thing. Mr. Morris
8 talks about the portfolio companies being in the money at any
9 given moment. Well, we all know that that's not a sure thing.
10 Look at 2008. Look at the huge drop in the market when COVID
11 happened. Look at what's even happening now with the Ukraine.
12 The fact that in any given moment the portfolio companies were
13 in the money doesn't mean that there was no consideration,
14 because that – the consideration is the fact is – that Jim could
15 have taken sure cash, and he didn't. He decided to wait for his
16 reward and now the debtor wants to take it away.

17 And did he do it perfectly, would it have been safer,
18 better, more careful, more prudent to have written them down, to
19 put it in the financial statements to say this, that, or the
20 other, – I'm getting ahead of myself – but, yeah, sure, maybe it
21 would have been, but he – but it was also the case that until
22 the contingency occurred, they were straightforward notes, and
23 so they got put in the books as straightforward notes.

24 And in the PWC deposition, Mr. Morris suggests without
25 actually showing you anything, that – that the PWC folks would

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1 have wanted to know about the forgiveness condition.

2 And I will grant you, you know, with a little cute
3 questioning he got the PWC accountant to say that, but not 10
4 minutes later, when Mr. Aigen cross-examined him, he said, 'Oh,
5 I didn't understand the question. I meant that if the
6 forgiveness event occurred, I would want to know about that, not
7 if there was some future potential possibility of the notes
8 being forgiven.'

9 Now was that a bad judgment call on Mr. Waterhouse's
10 and Mr. Dondero's part, to not say to the accountants then,
11 'Gee, there is this agreement. What should we do, should we
12 write it down or not?' yeah, maybe. I mean we wouldn't be here
13 if they had made this clearer. But that doesn't mean that the
14 agreement doesn't exist. And it also doesn't mean that it isn't
15 – it isn't enforceable.

16 You know the debtor argues, 'Oh, my God, there's no
17 disinterested party witness.' I mean that's even sillier,
18 because in most contract cases, think about who the witnesses
19 are. The witnesses are the interested parties, they're the
20 people to the contract or who say there isn't a contract. It's
21 almost always the interested parties that are the witnesses.

22 I think I've gotten a lot of off track, but I can – I
23 can get myself back on. So give me a minute, I will tell Mr.
24 Aigen what slide to go to.

25 Okay, why don't we go to 12. And if we come across

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1 things I've already covered, I will go really quickly over them.

2 So I mean I'm not going to read all of these to you,
3 but, Your Honor, in the briefs you will see – and I don't think
4 that the debtor seriously disputes that at least Mr. Dondero and
5 Nancy Dondero testified as to the existence of the agreement.
6 And we'll send you the PowerPoint and you'll have the – the aid
7 memoirs on where that is.

8 And if you go on to 13 and 14, these were – there are
9 here the parallel declaration testimony for Nancy. And if you
10 go to – I think that's on 13, 14 have the declaration testimony.
11 And if we go on to 15, okay, the debtor made a fuss and said,
12 'Oh, there are some that they said that Mr. Dondero didn't
13 really know about the notes.' And – but you have to look at
14 what the question really was. He says, he asked, "I'm asking" –
15 this is Mr. Morris asking Mr. Dondero – "I'm asking if during
16 your discussions with the Dugaboy trustee you ever disclosed the
17 name of the maker of any of the notes that were subject to the
18 agreements."

19 And Mr. Dondero answers, "She knew that the notes due
20 to – that she knew they were notes due to Highland from various
21 entities, so I don't know what your question is, but identify
22 specifically that there were notes due to Highland? I guess the
23 answer to that is yes, but I don't know what you're asking me."

24 It's clear in that little snippet that in the briefing
25 the debtor tries to make much of it's clear he got confused by

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1 the word maker. He didn't – you know, maker, payee, he wasn't –
2 and then Mr. Morris never made the question-clear, so it went
3 nowhere, and now the debtor says, 'Ah, he didn't even know who
4 was on what side of the notes. That's just clearly not true.

5 And I have to tell you, even myself, you know, when
6 someone says mortgagor and mortgagee to me, it takes me a
7 minute, I have to – or maker, I have to think for a minute which
8 one is that. I'm not a real estate lawyers, I don't use those
9 words all along. And we shouldn't be deciding things as
10 important as this based on – on kind of gotcha – gotcha
11 deposition questioning. If anything, what it shows is Mr.
12 Morris wasn't listening to the – to the answer to the question.

13 So if we go on to 16 now.

14 Another tactic that the debtor takes is tries to
15 create a summary judgment issue by saying Nancy and Jim disagree
16 about the notes are subject to the agreements, that the
17 deposition testimony doesn't show that, and then Mr. Dondero
18 specifically says in his declaration that he did discuss and
19 identify the notes that were subject to the agreement to Nancy.
20 So that's also not – not a reason to grant summary judgment.

21 We go on to 17.

22 Okay. Another thing that – that the plaintiff does is
23 it makes a big deal about the fact that Mr. Dondero couldn't
24 list which note was on which date for how much, to suggest that
25 the agreements must not have taken place. But that's clearly an

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1 attack on Jim's credibility, which is improper at this point.
2 And that takes us back to that Alsud case that you looked at
3 before, Your Honor. And it's important to look at what it
4 actually say is, which is to determine whether a genuine dispute
5 exists such that the case must be submitted to a jury, courts
6 must, not might or maybe, courts must consider all of the
7 evidence in the light most favorable to the nonmoving party,
8 that is, Mr. Dondero and the companies, draw all reasonable
9 inferences in light of the nonmoving party, refuse to make
10 credibility determinations, or weigh the relative strength of
11 the evidence. And that's — think about how many times you heard
12 Mr. Morris say something wasn't credible or that the plaintiff's
13 evidence was stronger or more voluminous than the defendants'.

14 The plaintiff is asking you to do the very thing the
15 courts say that the law prevents you from doing. You can't —
16 you can't say, ew, I find — I find the plaintiff's arguments
17 more credible here, I find Mr. Klos' declaration as more
18 credible than Mr. Dondero's testimony. That's not the purpose
19 of the Court on a motion for summary judgment, and that's true
20 whether this is a bankruptcy court or a district court. The
21 plaintiff, the debtor here is trying to lead you astray and I
22 just ask that you not be dragged along this road —

23 THE COURT: Let me ask you —

24 MS. DEITSCH-PEREZ: — and —

25 THE COURT: — to address head on I think a more

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1 nuanced argument that Mr. Morris is making. He says, 'I'm not
2 asking the Court to make a credibility assessment,' that he is
3 saying this, quoting Fifth Circuit law, he says I'm supposed to
4 focus on is there a dispute about a genuine material fact,
5 stressing the word "genuine material fact." And he cites Fifth
6 Circuit law that says if a reasonable jury could not possibly
7 return a verdict in favor of the nonmoving party, then that's
8 not a genuine dispute of material fact. What is your response
9 to that?

10 MS. DEITSCH-PEREZ: The response is that can't mean
11 that the – that the movant can say, 'Well, look at all of this
12 evidence and look at all of that evidence, and this evidence is
13 more credible than that evidence.' That's what Mr. Morris did.
14 He may put that law up on a slide, but what he actually did was
15 he pointed out various situations and said, 'Boy, someone
16 looking at that would think Mr. Dondero's going to have a hard
17 time explaining it.' That is the epitome of saying it's not
18 credible, that one side is more credible than the other. And
19 just by saying, 'Boy, this is hard to explain,' doesn't make it
20 not genuine.

21 There's a little bit of word play here. I mean the
22 debtor is still asking you to make a credibility determination,
23 that you should look at all of this evidence and say, 'Hmm, do
24 you think it happened or didn't you think it happened,' in the
25 face of testimony that it happened. There are two parties in

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1 the conversation about this agreement and both of them say it
2 happened. You don't really have a choice but to say this has to
3 go to a fact-finder.

4 THE COURT: All right. Well, I may –

5 MS. DEITSCH-PEREZ: Because Your Honor is not the fact
6 finder –

7 THE COURT: – I may – I'm going to ask you another
8 question. I'm going to ask you another question. There's also
9 plenty of case authority that says if – if the only thing that
10 seems to create a material fact dispute are affidavits with
11 conclusory, self-serving statements, then that's not enough,
12 okay. So –

13 MS. DEITSCH-PEREZ: But that's not what –

14 THE COURT: I think what I hear you saying is –

15 MS. DEITSCH-PEREZ: – that's not what this is.

16 THE COURT: – when – you know, when I've got any
17 testimony, I've got put it to a jury. But yet there is a nuance
18 there that courts sometimes recognize, right?

19 MS. DEITSCH-PEREZ: I think those cases are ones where
20 you have bet – where all you have a declaration that is after
21 the fact. It's not where you have deposition testimony that
22 establishes the disputed issue. Sometimes you'll have an
23 instance where parties will – will not give testimony on
24 whatever the issue is. And then afterwards, when it's pointed
25 out in a motion, they will either contradict themselves or they

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1 will say something that's never said before in a declaration,
2 and that's where you have those cases.

3 It's not – it's not where you have deposition
4 testimony that is – that does – that puts – that creates a live
5 issue. I mean this Court is just not entitled to sit here and
6 say, 'I just – I don't believe Jim Dondero and I don't believe
7 Nancy Dondero.' And – and that would be wrong. That would be
8 taking something on which they have – there is a right to a jury
9 trial away from them. I don't know how to say it.

10 And, not only that, it's not like that is the only
11 evidence, because there is the evidence of the – of the expert
12 that indicates that Mr. Dondero was under compensated. There is
13 the evidence of the tax expert who explains that if you want to
14 have tax-efficient compensation, you would have a bonafide note
15 and you would have to make it subject to a condition subsequent,
16 because otherwise Mr. Morris is right. If it had been a
17 different kind of agreement, if it was searched, that the note
18 was going to be forgiven, then there would be taxes owed on it
19 right away.

20 So if you look at those things, it's not just Mr.
21 Dondero's testimony and Nancy Dondero's testimony, it's
22 extraneous factors that also allow you to – allow not you –
23 allow a fact finder to find that, yes, that is how he was – how
24 he wanted to structure his compensation and that Highland, which
25 – you know for most of the time period, he was the largest

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1 shareholder and he was its CEO. He had every reason to ask them
2 and Highland had every reason to agree to let him structure his
3 compensation thus, because otherwise he just would have taken
4 out more money.

5 I mean there are a lot of private equity funds where
6 the owners take all the money out at the end of the year and
7 they basically start fresh the next year. That's not what –
8 what Highland did. He was building, you know, what Your Honor
9 has called this giant web, but he was building this big empire,
10 and that required leaving some money in there to be able to do
11 things with. And so he didn't take out every last penny that he
12 could take out. But he shouldn't be punished now for that.

13 He should be allowed to put it to a jury and have them
14 say, yeah, we believe you did this, or, no, we don't. But,
15 seriously, given what everybody has said about – about Mr.
16 Dondero and about how he wanted to make money, is there really
17 any doubt that he would – he would construct a plan by which he
18 had the chance to have these loans forgiven? I mean seriously,
19 nobody really thinks that he made these loans thinking there was
20 no chance that they wouldn't have to be paid back. Of course he
21 said up a plan where he would have the potential for
22 tax-efficient compensation. I mean to think that – I mean I
23 don't believe Mr. Morris thinks, I don't think the debtor
24 thinks, I don't think Your Honor thinks that he was making – he
25 was taking these loans that he thought for sure weren't going to

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1 have to be paid back. He was doing something where he thought
2 he would have the ability to turn them – or to have be turned
3 into compensation if – if Highland succeeded in the way that he
4 hoped it would.

5 THE COURT: Anyway, –

6 MS. DEITSCH-PEREZ: And I ask you to think about that
7 when you think about whether it's credible –

8 THE COURT: We're – I am thinking about it. We have
9 16 notes that were talking about in this litigation.

10 MS. DEITSCH-PEREZ: Um-hum.

11 THE COURT: It's roughly \$70 million worth of notes.

12 MS. DEITSCH-PEREZ: Um-hum.

13 THE COURT: And it all – well, let's see. There was
14 one November 2013 note, but with that one exception, they are
15 all within two and a half years of the bankruptcy, 2017, 2018,
16 2009 [sic], so \$70 million of notes, mostly in the two and a
17 half years before Highland is in bankruptcy. And, again, you
18 know, context matters, Highland's hurdling towards bankruptcy or
19 the zone of insolvency at some point – well, anyway, I don't
20 know if that's in summary judgment evidence, –

21 MS. DEITSCH-PEREZ: I – it's not, right –

22 THE COURT: – evidence –

23 MS. DEITSCH-PEREZ: It's not, Your Honor, exactly –

24 THE COURT: – in this case. But the point is \$70
25 million of notes, all –

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1 MS. DEITSCH-PEREZ: Your Honor, that's -

2 THE COURT: Let me complete my thought.

3 MS. DEITSCH-PEREZ: I know.

4 THE COURT: It's taking me a lot to get it out -

5 MS. DEITSCH-PEREZ: Well, I apologize.

6 THE COURT: But 70 million of notes, 16 notes, all but
7 one is within two and a half years before the bankruptcy is
8 filed. And the defense is, the defense that requires this to go
9 to a jury in - in your client's estimation is there was
10 basically a secret oral agreement between Dondero and his
11 sister, who had no management role at all with any of these
12 entities, but was the trustee of his family trust, which is the
13 majority owner of Highland, there was a secret, oral agreement
14 that these don't have to be repaid. And never was this
15 agreement - never was this agreement disclosed to the other
16 officers of Highland or these makers. And, in fact, they never
17 showed up, the oral agreement never showed up in a footnote or
18 anywhere on - on audited financial statements or bankruptcy
19 schedules that are signed under penalty of perjury, or monthly
20 operating reports that are filed under penalty of perjury, nor
21 in any objection to the disclosure statement or plan when
22 objections were made about feasibility.

23 So that - I mean, again, I'm just trying to assess
24 does this need to go to a jury. That's what Judge Starr is
25 going to want to know. Did I correctly encapsulate your -

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1 MS. DEITSCH-PEREZ: And –

2 THE COURT: – your defense?

3 No. Okay, what –

4 MS. DEITSCH-PEREZ: No, because – no. And the reason
5 the answer is no, because you – there was an important sort of
6 assumption buried in there. You said that these notes would be
7 forgiven. And the – and the fact is it was not the – the
8 agreement was not that the notes would be forgiven, –

9 THE COURT: They might be, they might be.

10 MS. DEITSCH-PEREZ: – they would only – exactly.
11 Exactly. And so, for better or worse, they didn't think it – I
12 mean Mr. Dondero testified he didn't – for that reason didn't
13 think it was material because they might be, they might not be
14 until the condition was triggered. They were just – they were
15 just notes. And so could he have been wrong in that assessment?
16 Yeah, I mean maybe a cons- – a more conservative person would
17 have said, 'Ew, you know, this could be forgiven.' But he
18 didn't. But that doesn't mean summary judgment should be
19 granted against him. It means that's a fact that the fact
20 finder is going to consider in whether or not they think this
21 happened. You have to balance that against do you really think
22 he didn't make a plan where he had the potential for more
23 compensation? That doesn't sound very much like Mr. Dondero.
24 So it's not quite as cut and dry as Your Honor posited.

25 It's also not true that it was secret, because while

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1 it was not a fulsome disclosure, Mr. Dondero, before this all
2 became an issue, did tell Mr. Waterhouse that, 'Wait a minute,
3 these might end up being compensation.' Now did he sit down and
4 tell him chapter and verse? No, but it's undisputed, nobody's
5 challenged the fact that he did tell that to Mr. Waterhouse.
6 And that is evidence of the agreement and that he also told -

7 THE COURT: So that where is that - where is that
8 evidence? Where is that evidence? When -

9 MS. DEITSCH-PEREZ: It - it -

10 THE COURT: And how did he tell Mr. Waterhouse?

11 MS. DEITSCH-PEREZ: There - there - he - there is
12 testimony from Mr. Dondero, and in our next break I'll find the
13 page and line number and the appendix. There is testimony from
14 Mr. Dondero that he told Mr. Waterhouse that the agreements were
15 potential compensation, you know. And - and you heard Mr.
16 Morris concede that during his opening, but we'll get you the
17 actual page and line. And then Mr. Waterhouse -

18 THE COURT: But it's just testimony. It's just
19 testimony from Mr. Dondero.

20 MS. DEITSCH-PEREZ: And then you also have Mr.
21 Waterhouse saying that, yes, Jim said something to him in the
22 context of when they were discussing putting up a competing
23 plan, that he shouldn't be counting the notes as money that was
24 due to Highland because they were potentially going to be
25 compensation and they should take that into account in doing the

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1 pot plan.

2 So that's something before we were in this litigation
3 fight that indicates there was some kind – something out there
4 that might have converted these notes into something less than
5 straightforward, plain vanilla pay your money notes.

6 And then on top of that, and I will concede this is
7 after litigation started, but really before anybody started
8 digging in to investigate the lawsuits and to find out all the
9 facts. When the debtor said something overt about counting on
10 the money, Judge Lynn wrote to – I think Pomerantz, not Mr.
11 Morris, Mr. Pomerantz and said, 'Wait a minute. Those are
12 potentially compensation, so don't go selling those notes
13 without telling somebody.'

14 So it's not true that these were completely secret.
15 It is the disclosure what –

16 THE COURT: Uh-oh. We're frozen. We're frozen. Can
17 anyone hear me?

18 (Off the record from 2:47 to 2:52 p.m.)

19 THE COURT: Okay, is everyone back on, Mr. Morris, Mr.
20 Rukavina?

21 MR. RUKAVINA: Yes, Your Honor. It's –

22 MR. MORRIS: Yes, Your Honor.

23 MR. RUKAVINA: We all – we all can hear each other
24 perfectly. Sometimes the Court, we can't hear you perfectly.
25 So I suggest that the problem is on the Court's end.

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1 THE COURT: Okay, okay. We've got the IT guy coming
2 back up here. I'm going to have him just sit through the rest
3 of this, but for now, Ms. Perez, you can continue.

4 Just a minute.

5 Harold, can you stay, because they're saying it's at
6 our end because when we freeze, they can all hear each other but
7 not us.

8 Okay, so we got an IT guy.

9 Ms. Perez, you can continue. Let's see, where were
10 you.

11 MS. DEITSCH-PEREZ: I think actually we – we were
12 talking about the fact that the agreement wasn't really secret,
13 that there had been some heads-up to Mr. Waterhouse and from
14 Judge Lynn to Jeff Pomerantz. And, in fact, you had asked what
15 – where was the testimony about telling Mr. Waterhouse.

16 And, Mike, if you go to slide 18, I think we quote –
17 we quote at least Jim's there. So there was a little bit of it
18 there. And we can also get you the Waterhouse page and line
19 numbers also.

20 So I'm going to jump ahead because in the course of
21 answering your questions, I did cover some of this, so we can go
22 past 18. And then 19, this is the letter from – that I just
23 talked about. And let's go on to 20.

24 THE COURT: Okay. I'm not seeing the slides, so the
25 same thing –

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1 MS. DEITSCH-PEREZ: You're not seeing the slides?

2 THE COURT: — same thing happened earlier today when
3 we had to reconnect.

4 MS. DEITSCH-PEREZ: Mike, would you stop sharing and
5 then reshare?

6 THE COURT: Okay, got it.

7 MR. AIGEN: We're okay.

8 MS. DEITSCH-PEREZ: Okay. And so, you know, another
9 thing that the debtor points out is, gee, there was a time
10 period when a little bit of MGM stock was sold and Mr. Dondero
11 did not immediately jump up and down and say, 'Okay, you better
12 forgive my loans,' and therefore the fact that he didn't do that
13 must mean there was no agreement, there were no agreements. No,
14 all it meant was that Mr. Dondero was trying to maximize the
15 prospects for reorganization. And, as Mr. Morris is found of
16 saying, no good deed goes unpunished because now it's being
17 raised as a defense or a counter to — to the defendants'
18 defense.

19 So if we go on to slide 21, again there's some fuss
20 about whether Nancy looked at the notes at the time she was
21 entering into the agreement. You know, that's the kind of thing
22 that maybe Mr. Morris could fool a jury that that's meaningful.
23 But that would actually be a good reason for a motion in limine,
24 not summary judgment to — to knock it out.

25 The same thing about the focus on the fact that it's a

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1 verbal agreement. I mean maybe that ought to be limined out of
2 a jury trial or at least the amount of argument on it limited
3 because lawyers tend to play on the prejudices of nonlawyers
4 that contracts must be in writing or that certain formalities,
5 like showing her the notes, must be met when they're not
6 requirements at all.

7 So let's go on to slide 22.

8 Again here are some extrinsic evidence that tends to
9 support the notion that there was an agreement. The debtor
10 says, well, there's no history of forgiving loans as
11 compensation, but in fact that's not true. Mr. Seery admitted
12 that they had found some. Now it wasn't widespread, it wasn't
13 all the time, but there is evidence that other executives had
14 loan – had regular straight-up, bonafide loans that were
15 subsequently made forgivable based on – based on how they did.
16 And here is a little bit of the testimony of Mr. Dondero
17 battered (phonetic) and in his deposition. There's more.

18 So not only plaintiff is wrong that there was no prior
19 practice, even if there wasn't one, that wouldn't be summary
20 judgment evidence that this agreement didn't take place, but the
21 fact that there were other people who got such agreements is
22 evidence, so again summary judgment. It supports the existence
23 – it supports the existence of an agreement.

24 And this also takes us back to what I was talking to
25 you about earlier that doesn't it seem more likely to you than

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1 not that Mr. Dondero would – would take the advice of someone
2 like Professor McGovern (phonetic) on how to have compensation
3 that was tax efficient, which is you borrow some money and then
4 you could either later take more money as part of your
5 compensation or you make the loan forgivable if you succeeded in
6 something. And the latter is tax efficient. Taking, just
7 taking the money is not tax efficient. Is there anyone here who
8 would doubt that Mr. Dondero would take the tax-efficient way?

9 Let's go to the next slide.

10 MR. RUKAVINA: Hey, Ms. Deitsch-Perez, I must
11 interrupt you, –

12 MS. DEITSCH-PEREZ: Yeah.

13 MR. RUKAVINA: –, please. I need to take over. And
14 if I have any time left over, I will yield it, but you've had 70
15 minutes by my clock.

16 MS. DEITSCH-PEREZ: I do apologize and part of that
17 was in answering questions. If you give me just one minute, I
18 will look to see if there is anything that absolutely must be
19 said and then –

20 MR. RUKAVINA: Thank you.

21 MS. DEITSCH-PEREZ: – I will yield the field.

22 Yeah, I do want to go quickly to slide 27, okay.
23 Maybe it's 28. Okay.

24 There was confusion in Mr. Morris' argument about
25 consideration. We are not arguing that the sole consideration

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1 was that Mr. Dondero work harder. He could have and would have
2 taken more compensation, which he was entitled to do, because if
3 you look back at the LPA, even – you know, he could have taken
4 \$5 million a year or even more if there was no NAM (phonetic)
5 trigger, and the debtor does claim there was a NAM trigger
6 period. He could have taken much more compensation if he had
7 not gotten this agreement, so there is no lack-of-consideration
8 argument.

9 And I will – I would urge you, we'll send you these
10 slides, just look at what we have to say about competence.
11 There is no serious argument that Nancy was not competent to
12 enter into an agreement. Lack of competence means something
13 like you were drunk or you were mentally ill or otherwise
14 incapable of entering into the agreement.

15 And I mean if a client tasked me with – with
16 negotiating an agreement on – you know, that involved particle
17 physics and to get all the components that are needed to build
18 some equipment, and I did a crappy job at it because I knew
19 nothing about the subject matter, no one would seriously argue
20 that you could not enforce the contract because the party tasked
21 with negotiating, you know, wasn't the ideal person to do it.
22 That's not what lack of competent – competence means.

23 And I will now leave for Mr. Rukavina to please cover
24 the issues with respect to Highland should have been taking care
25 of the payments and the prepayment arguments. And if I have

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1 more time later, I will take it. Thank you very much, Your
2 Honor.

3 THE COURT: All right. Thank you.

4 Mr. Rukavina.

5 MR. RUKAVINA: Thank you, Your Honor.

6 I think first the Court is under the assumption that
7 these were all notes for \$70 million in the couple of years
8 before bankruptcy. That is not correct.

9 So, Mr. Vasek, please pull up the NexPoint note and go
10 to the last page.

11 So this is the NexPoint note, Your Honor, almost half
12 of the amount. And you will see this is from 2014 and 2015.
13 This is our old note.

14 Go to the very top, Mr. Vasek.

15 And at the very top it says that this note is in
16 substitution for and supersedes the prior note. So the monies
17 were extended in 2014 and 2015. HCMC likewise goes back to
18 2015. I don't have it to share right now. And HCRE goes back
19 to 2014. I don't have that to share right now either.

20 You can remove that, Mr. Vasek.

21 But I think everyone here knows that in 2014 and 2015
22 Highland was doing very, very well, certainly much better than
23 in 2019. So I just wanted to correct the Court's review that
24 the monies were actually transferred from Highland in 2019 or
25 so, and 2018. HCMFA, that is true, but it is not for the other

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1 notes.

2 Mr. Vasek, if you will please pull up my deck.

3 So – so, first, Your Honor, let me address the
4 prepayment affirmative defense, and this is an affirmative
5 defense. And I want to focus on NexPoint, which is my client.
6 But I think Ms. Deitsch-Perez's clients have identical issues.

7 So first we have to look at the language of the note.
8 And it clearly says that the maker may prepay in whole or in
9 part the unpaid principal – everyone knows what that means – and
10 then it says, "or accrued interest of this note." I don't
11 understand how one prepays accrued interest. Accrued interest
12 means that it's already happened and you're paying it, but the
13 note says accrued – prepay accrued interest. The Court must
14 construe the instrument to give that meaning.

15 And here you see I have a quote from Mr. Seery when I
16 asked him this at his deposition. He says: Interest accrues on
17 this note. How you prepay it is you send the money before the
18 accrual date.

19 So that makes sense. So you want to prepay future
20 interest, basically. That's what prepaying accrued interest
21 means.

22 But look at the second sentence of this provision. It
23 says: Any payment on this note shall be applied first to unpaid
24 accrued interest and then to unpaid principal hereof. So we
25 have here immediately an ambiguity. So I'm allowed to prepay

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1 future interest, but the second sentence says that any payment
2 first goes to accrued interest, meaning present, historical
3 interest, and into unpaid principal. So how can a prepayment
4 ever go towards future interest? So again we submit that there
5 is an ambiguity in this provision.

6 Go to the next slide.

7 But clearly what my client had done before, was it did
8 prepay future interest. This is the actual course of conduct
9 between the parties. This is the ledger that is in the debtor's
10 appendix. I can certainly give you the citation. And we – Ms.
11 Hendrix at her deposition walked us through it. So this is
12 NexPoint right now.

13 So you see on the left there is a column that says,
14 "Interest accrual," that's how much interest is accrued at any
15 given point in time. "Interest paid" and "Accrued interest."
16 So I want to take Your Honor to near the bottom, May 9th, 2018.
17 On May 9th, 2018, NexPoint made a \$879,000 and change payment.
18 And look at how the debtor applied that. Even though there was
19 only \$39,000 of accrued interest pending, the balance did not go
20 to the principal. The balance went to future interest. You see
21 that there is a negative entry of \$835,000 interest. And then
22 as time goes on, – I don't have the rest of it right now, I can
23 certainly pull it up – as time goes on, if Your Honor looks at
24 this, you will see that basically the prepayment of that future
25 interest basically took care of many months of future interest.

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1 This also happened on December 5th, 2017, when there
2 was a prepayment of future interest of \$127,000, and on December
3 18th, when there was a prepayment of future interest of \$60,000
4 and more. So – and obviously we know that the Court can look at
5 the parties' course of conduct whether the contract is ambiguous
6 or not. The contract does have to be ambiguous for the Court to
7 look at the course of conduct to understand how the parties
8 understood and applied this change.

9 Again, all this is more fully set forth in our brief.
10 And if the Court needs me to pull up the full payment ledger, I
11 certainly can. But the only point of this exercise is to show
12 you that the debtor and NexPoint historically understood the
13 note to allow the prepayment of future interest, not just
14 principal and not just accrued interest.

15 Next slide, please.

16 So what we have is between March and August of 2019,
17 NexPoint made \$6.38 million on its note, and the other
18 defendants – again, what I'm saying, Your Honor, goes for the
19 other defendants. I'm using NexPoint because, well, it's my
20 client and it's – one example is better than more [sic].

21 But that \$6.38 million were not due. Rather, after
22 using it, a portion of that to pay for future interest and
23 principal, a credit, if you will – I'm going to call it a credit
24 – of \$4.1 million remained. Now when – when NexPoint was making
25 these payments in 2019, Mr. Dondero very clearly testified that

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1 these were intended to be prepayments. So as happened, and as
2 you will see, Ms. Hendrix confirms, as did everyone else, as
3 what happened, as Highland needed liquidity, as Highland needed
4 cash, some of these term defendants would prepay. Mr.
5 Waterhouse would call Mr. Dondero and say, 'We need cash,' and
6 Mr. Dondero would say, 'Okay, how much,' and then it would be
7 and it should have been recorded as a prepayment. So Mr.
8 Dondero clearly talks about how when NexPoint made these
9 payments, and this is in his declaration, Your Honor, and it's
10 in his deposition, he expected that these were prepayments.

11 Next slide, please.

12 Now the Court may not necessarily believe that Mr.
13 Dondero is the most credible person. I would disagree with
14 that. And of course we're not here today on credibility
15 determinations. But this is Ms. Hendrix. Ms. Hendrix is still
16 with the debtor. She was at that time the debtor's senior
17 accountant and she is now the debtor's controller. She
18 certainly is going to be credible and she certainly has no
19 reason to try to wriggle out of any promissory note.

20 So I ask her does she have any understanding as to why
21 in 2019 NexPoint was making these large payments. And he she
22 goes on to testify that, without looking at all the emails,
23 Highland would have needed cash, so this was one way to get the
24 cash to the debtor.

25 I ask, "So this is kind of like what we discussed in

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1 the beginning, that Mr. Dondero on a cash-needed basis would
2 just transfer money between entities?

3 "Yes.

4 "Do you have any memory in the first half of 2019
5 whether Highland had any particular need for cash money?"

6 She says, "We always had a need."

7 Then I ask her, "If NexPoint – if NexPoint was
8 transferring money back to Highland on this note, because
9 Highland needed the money, wouldn't those have been recorded as
10 prepayments by the debtor?"

11 Mr. Morris objects to form. "You can discuss that."

12 But she says, "Yes." So she confirms that if NexPoint
13 was making large unscheduled payments on its promissory note,
14 they would have been recorded as prepayments.

15 Now why is that important?

16 Next slide, please.

17 So recall, Your Honor, that at the end of 2019,
18 NexPoint, there was what I call a credit of \$4.1 million.
19 NexPoint had prepaid \$4.1 million. Our argument is that that
20 was enough to prepay all of the accrued and unpaid interest and
21 principal due in the year 2020. So recall the issue is that
22 NexPoint did not make the 2020 payment on or before December 31,
23 as the debtor alleges is required.

24 NexPoint did make payments. And NexPoint had an
25 unallocated, unapplied \$4.1 million – again what I call –

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1 credit, which Mr. Dondero and Ms. Hendrix both state should have
2 been a prepayment. Very importantly, these notes do not have
3 language that say that a prepayment does not relieve the maker
4 of any scheduled payments. Most notes that we have, that we
5 have seen, at least in bankruptcy, where there is the ability to
6 prepay, the note also says that making a prepayment does not
7 relieve you of scheduled payments.

8 So we believe that it is equitable, appropriate, and
9 fair, in compliance with Texas law, and the intent of the
10 parties that those 2019 overpayments, credits, prepayments are
11 left there for future application against future obligations.
12 We know that all reasonable inferences must be drawn in the
13 nonmovant's favor. And we know from Texas case law, we quote
14 this and we discuss this, that when neither party clearly
15 applies a prepayment against an obligation, so Mr. Dondero knew
16 that there were prepayments, but he did not say those better
17 relieve me of my December 31, 2020 payment, and Ms. Hendrix knew
18 that they were prepayments, but she didn't say those are going
19 to or those are not going to relieve your debt. So when we have
20 something like this, where neither party clearly applies the
21 prepayment to any obligation, then it is up to the law and the
22 equities of the case to make a proper application of that
23 payment.

24 And, importantly, under Texas law, Texas Supreme Court
25 law, that such a presumed legal equitable application should be

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1 done in the manner that would be most beneficial to the debtor.
2 So it's just logic. It's not — there's nothing magical about
3 it. My client overpaid by \$4.1 million in 2019. That was
4 intended to be a prepayment. The debtor asked for that money
5 because the debtor needed that money. The debtor got the
6 benefit of that money. And the most logical, best, most
7 equitable way to apply that is against the next scheduled
8 payments. That's what happened before. There is no language
9 that says you have to make scheduled payments.

10 Now we believe there are no real disputes of fact on
11 anything I've just shown you. Yes, perhaps the trier of fact
12 can apply the prepayments differently. The trier of fact can
13 say, 'Well, we're going to apply them to principal.' But the
14 law clearly allows the trier of fact to decide, based on the
15 equities, where the prepayments should be applied. And because
16 that is a question of fact, Your Honor, it is outside the scope
17 of summary judgment. The Court should, therefore, deny summary
18 judgment on the prepayment defense, allow these facts to be
19 presented to a jury. And the jury, based on all the facts that
20 it hears, will decide whether the default Texas law that the
21 payments should be applied as most beneficial to NexPoint should
22 be followed or, for some other reason, it shouldn't.

23 Next slide, please.

24 The next defense, which is probably an affirmative
25 defense, concerns the fact that we contracted with Highland to

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1 monitor and take care of our payables for us. So you heard Mr.
2 Morris talk about the shared services agreement. You heard him
3 talk about Section 2. I heard him say something that I don't –
4 I don't know if I heard him right, which he said something like
5 'We're just pulling this out of thin air,' but the NexPoint
6 shared services agreement clearly says that NexPoint shall
7 provide assistance and advice, not just assistance, Your Honor,
8 but advice, with respect to back-office and middle-office
9 functions, which clearly contemplates payables, and then it
10 says, "including but not limited to payments, accounts
11 payables," and other things, like cash management, finance,
12 bookkeeping.

13 Then it says, "assistance and advice on all things
14 ancillary or incidental," incidental "to the foregoing." And
15 then it also says "other assistance and advice relating to such
16 other back- and middle-office services in connection with the
17 day-to-day businesses," et cetera.

18 So NexPoint – and, again, Ms. – Ms. Deitsch-Perez
19 might talk about a couple of the other ones that didn't have
20 written service agreements, but NexPoint had a written service
21 agreement where we contracted with the debtor to monitor and
22 take care of and advise us with our payment responsibilities –
23 next slide – that's black and white in the contract, Your Honor.

24 But we asked Mr. Waterhouse whether these services
25 would have included making sure that NexPoint would pay under

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1 long-term obligation notes. I asked, "Was it reasonable for
2 NexPoint to expect debtor employees to ensure that NexPoint
3 timely paid its obligations?" There's a couple of objections to
4 form.

5 But Mr. Waterhouse says, "Yes, we did that. We did
6 that generally. Again, I don't remember specifically. But,
7 generally, yes, you know, we did that."

8 And then I says, "Roles – what role in years prior to
9 2020 would employees of the debtor have had with respect to
10 NexPoint making that annual payment?"

11 Now he answers without objection, "We would. Since we
12 provided treasury services to the advisors, we would inform" –
13 blah-blah-blah – "we informed Mr. Dondero of any cash
14 obligations that are forthcoming. We do cash projections. But,
15 yes, it is to inform Mr. Dondero of the obligations of the
16 advisors in terms of cash and obligations that are – are
17 upcoming and that are – are scheduled to be paid."

18 Next slide.

19 Then I ask and, again without objection, he answers.
20 "I asked prior to the 2020 would those services have included
21 NexPoint's payments on the \$30 million loan?" He says, "Yes."

22 And then I ask, "And based on your experience, would
23 it have been reasonable for NexPoint to rely on the debtor's
24 employees to inform NexPoint of an upcoming payment due on the
25 \$30 million promissory note." That's the December 31, 2020

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1 payment.

2 Again there's a couple form objections that I don't
3 understand the basis for it. This is the debtor's CFO. This is
4 my treasurer. This is a man that worked in shared services
5 certainly knew what would have been reasonable, and he says,
6 "Yes. Yes, they did." But then of course he adds, "Those notes
7 weren't a secret to anyone."

8 Let me also correct something that Mr. Morris
9 mentioned. Mr. Morris said at that no one Social Security any
10 provision that Highland is supposed to pay these notes. It's a
11 play on words, Your Honor. Of course Highland doesn't pay on
12 our notes. As the summary judgment record shows, as Mr.
13 Waterhouse, as Mr. Klos, as Ms. Hendrix all testified, it's in
14 their depositions, it's in my brief, Highland would pay advisor
15 bills from advisor funds. Highland had access and control over
16 advisor accounts and Highland would make those payments.

17 Mr. Morris also referenced those emails where Ms.
18 Hendrix would ask Mr. Waterhouse for approval to make payables.
19 That's exactly what happened. That happened on at least a
20 weekly basis. But Mr. Waterhouse was wearing his CFO of
21 Highland hat when the a happened. Ms. Hendrix was not an
22 advisor employee. Ms. Hendrix, pursuant to shared services,
23 was asking Mr. Waterhouse, pursuant to shared services, whether
24 the following bills and obligations of the advisor should be
25 paid. So let's be clear on that. we are not arguing that

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1 somehow Highland had to use its money to pay our obligation, not
2 at all. Just that Highland had to assist and advise us.

3 Next slide, please.

4 Now we come to the question of fact. The underlying –
5 well, I apologize. Who is it – Julian, I see, viewing "Julian
6 Vasek" right over my title. What is this? Who is testifying
7 right here?

8 THE COURT: Hendrix.

9 MR. RUKAVINA: Is this – is this Hendrix? Hendrix.
10 Thank you.

11 MS. DEITSCH-PEREZ: Hendrix.

12 MR. RUKAVINA: And I apologize, Your Honor. I just –
13 I don't know why I can't read it.

14 Just to round out the discussion, not only – if the
15 Court questions Mr. Waterhouse's sincerity, again, you can't
16 question Ms. Hendrix's sincerity.

17 Ms. Hendrix, again I ask her there at the bottom, "As
18 part of that in December 2020, would it have been employees of
19 the debtor that would have scheduled potential payment subject
20 to approval by NexPoint, NexPoint's future obligations as they
21 were coming due, she says, "Yes, only with approval."

22 And then I ask, "And would that have included
23 NexPoint's obligations on the promissory note to Highland." And
24 she says, "Yes," again without objection.

25 So we're on the next slide.

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1 And Mr. Dondero confirms the same, but you can go to
2 the next slide. So we have again Mr. Dondero, Mr. Waterhouse,
3 and Ms. Hendrix all discussing how the advisors would rely on
4 Highland to schedule and advise with these payments, and how
5 that was one of the services contracted out to Highland.

6 Now here is the dispute of fact, one that the Court
7 obviously cannot resolve. In late November or early December
8 2020, Mr. Dondero learns of alleged overpayments under shared
9 services, and he tells Mr. Waterhouse stop payments. Mr.
10 Dondero said, testified, he said stop payments just on shared
11 services and payroll reimbursement. Mr. Waterhouse testifies,
12 no, no, Mr. Waterhouse said – Mr. Dondero said stop all
13 payments.

14 So if the jury believes Mr. Dondero, that he did not
15 say stop payments on the notes, then Highland's fault is
16 obvious. Likewise, if the jury believed Mr. Waterhouse, then
17 Highland's fault is still obvious because, as Mr. Waterhouse
18 confirmed, after he got that instruction from Dondero, he did
19 nothing. He did nothing. He literally put his head in the sand
20 and did nothing.

21 Well, I'm sorry, but the CFO and treasurer, someone
22 who that is contracted out to provide these services, needed to
23 take some action, such as ensure if he understood Mr. Dondero
24 correctly, try to advise Mr. Dondero of the consequences, and
25 try to convince Mr. Dondero otherwise. Would Mr. Dondero and

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1 NexPoint really for a million dollars, especially because it had
2 been prepaid, wanted to default on what was at that time – I
3 forget how much – a 23,-, \$24 million note? Of c- – Your Honor
4 mentioned it this morning. When the Court denied our Rule 16
5 motion to extend the expert deadline for Pully, the Court found
6 that expert testimony was not needed to decide this standard of
7 care. A reasonable jury can conclude that Highland was at
8 fault, whether it's Waterhouse's or Dondero's testimony. And
9 here is why.

10 Next slide, please.

11 The shared services agreement, Your Honor, there it is
12 in the middle, standard of care, it expressly provides that
13 Highland will fulfill its duties with the care, skill, prudence,
14 and diligence under the circumstances then prevailing that a
15 prudent person acting in like capacity, et cetera, et cetera, we
16 discussed this at the Rule 16 hearing.

17 So we know that the Court cannot – first of all, we
18 know that there is language in the shared services agreements
19 requiring Highland to assist and advise NexPoint with its
20 payment obligations. We know that Dondero, Waterhouse, and
21 Hendrix all testified that that included ensuring that NexPoint
22 was advised of its upcoming note payment.

23 We don't know whether Dondero or Waterhouse, which one
24 the jury will before, we can't – the can't decide that. And the
25 Court also can't decide whether this black-and-white standard of

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1 care was satisfied. But the Court did rule that that does not
2 require expert testimony, that that is within the average
3 juror's ability to decide. And although I am seeking a
4 reconsideration of that order, I don't have that
5 reconsideration, so right now this Court's order stands that I
6 do not need expert testimony to prove up that that standard of
7 care was violated.

8 And we know from the United States Supreme Court that
9 on summary judgment the Court cannot decide whether a standard
10 of care was violated or not. But, again, there is a standard of
11 care and there is a service contracted for.

12 Next slide, please.

13 And that means that under Texas law, Your Honor, that
14 one whose negligence caused a delay in performance of a
15 contract, that delay is excused. We have cited case after can
16 for that proposition. I'm not going to read them to you, but
17 it's also common sense.

18 If I contract with someone to do something for me and
19 they mess up, they fail, they can't then take advantage of my
20 resulting delay, when I have been paying them and relying on
21 them to make sure that I do it right. That, Your Honor, is the
22 Highland fault affirmative defense.

23 Next slide.

24 And, again, that defense is factually intensive.
25 There are disputed facts, but it is a valid defense under Texas

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1 law.

2 The final one, and I will be very brief on this, Your
3 Honor, the record is clear, a couple of weeks after the default,
4 the defendants, NexPoint, we actually made the payments. What
5 happened was Dondero called Waterhouse, Waterhouse said, 'Well,
6 you didn't make the payments.' Dondero said, 'Make the
7 payments.' So now we have – we have questions of fact.

8 Mr. Dondero has given sworn testimony that when he
9 made those payments, it was his understanding that they would
10 cure the prior defaults. Now at this time Mr. Waterhouse was
11 still the CFO of the debtor. He certainly had the ability to
12 speak at least with apparent authority for the debtor. At this
13 time – so go to the next slide, please – at this time Mr.
14 Waterhouse did not advise Mr. Dondero that the payments would
15 not cure.

16 Now in truth and in fairness, Mr. Waterhouse – no one
17 remembers whether Mr. Waterhouse said the payments will cure. I
18 don't have any evidence of that. I'm not arguing that Mr.
19 Waterhouse told Dondero, 'Make these payments and your defaults
20 are cured and the notes unaccelerated.' The point is, going
21 back to the standard of care, Your Honor, under shared services,
22 Mr. Waterhouse did not advise Mr. Dondero that making these
23 payments will not or might not or Mr. Seery might decide not
24 cure your defaults. That is exactly what the CFO and treasurer,
25 a Highland employee, under contract to provide us with advice

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1 regarding our payments should have said. That is an omission by
2 him. So he basically induced Mr. Dondero to have these payments
3 made. Mr. Dondero believed that they would cure the – the
4 defaults. And Highland kept the money. That's again common
5 sense.

6 Would Mr. Dondero have really said, 'Make millions of
7 dollars of payments,' after we had been defaulted and
8 accelerated if he did not believe that it would not cure and
9 unaccelerate the notes? But that is a question of fact.

10 Whether Mr. Dondero's expectation was reasonable is a question
11 of fact. Whether Mr. Dondero is telling the truth is a question
12 of fact. Whether Mr. Waterhouse is telling the truth, it's a
13 question of fact. And that's all that matters for purposes of
14 summary judgment.

15 Is that the last slide, Julian?

16 So those – that rounds off, Your Honor, our discussion
17 – you can close this, Julian – that rounds off our discussion
18 the note, the terminal defendants. Now let's move to HCMFA.
19 And I want to try to be brief on this one because I understand
20 that I'm not going to be permitted to argue the signature issue,
21 which would have otherwise consumed a lot of time.

22 Please pull up the HCMFA one, Julian.

23 MR. VASEK: Just a moment.

24 MR. RUKAVINA: So go to the next slide, please.

25 So the defense here, Your Honor, is mutual mistake.

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1 We have two promissory notes, May 2nd of \$2.4 million, May 3rd
2 of \$5 million. And – and the core of the mistake is that these
3 – these were transfers that happened from Highland to HCMFA, but
4 that they were never intended or authorized to be loans, were
5 instead compensation. And we're going to go through that in
6 quite some detail.

7 Next slide, please.

8 So this is back to that time line I shared with you
9 earlier. The bottom half now really won't matter. It related
10 to the signature issue that has been precluded.

11 So we have the shared services agreement from 2013.
12 It's a little bit different than the NexPoint one I just
13 discussed. This is a separate HCMFA one, but we'll get to that.
14 And in 2018, there is a valuation error regarding an asset
15 called TerreStar. And it's all in the record. Your Honor has
16 the post error memo, Your Honor has the memo to the SEC. There
17 was a mistake made that caused millions of dollars in damages to
18 one or more funds.

19 HCMFA contracted valuation services to Highland,
20 pursuant to the shared services agreement. That's one of those
21 middle-office things you've heard about. So ultimately what
22 happened was that HCMFA, pursuant to a compromise that involved
23 the SEC and the insurance carrier, paid just over – or just
24 under \$5.2 million as compensation to the funds. And then on
25 May 2nd, it paid an additional just under \$2.4 million. There

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1 is a contradictory evidence, which again the Court can't
2 resolve. Mr. Dondero, Mr. Waterhouse believed that \$2.4 million
3 to be compensation. And that's also in the post-error memo that
4 we have that we can walk through. Whereas, Mr. Klos and Ms.
5 Hendrix remembered that \$2.4 million to be a consent fee, a fee
6 payable to the holders of various funds to convert them from
7 open to closed funds – or maybe I'm inverting that.

8 So now we have the two promissory notes, we have the
9 two payments on account of the NAV (phonetic) error. Then
10 Highland calls the notes. These were demand notes. Highland
11 files the complaint. We first answer with no affirmative
12 defenses. After filing a motion for leave, we assert the
13 affirmative defense of mutual mistake. And, very importantly, I
14 walked you through it this morning, I can well, you through it
15 again, we assert in multiple places that we did not execute the
16 notes and that Mr. Waterhouse did not have authority on behalf
17 of NexPoint to execute the notes –

18 (Very brief garbled audio.)

19 MR. RUKAVINA: – signature. I'm not talking about the
20 signature now. I'm talking about that NexPoint did not execute
21 the notes and that Mr. Waterhouse wasn't authorized.

22 Next slide, please.

23 So this is – this is a new record. Mr. Dondero
24 testified and gave an affidavit, and it's always been
25 consistent, that he was very angry about these mistakes. They

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1 cost a lot of money. Yes, the insurance paid for five point
2 something, but it was very embarrassing. It caused a huge
3 amount of internal problems. Everyone in the complex knew about
4 this because you don't make errors like this, no. So Mr.
5 Waterhouse — I'm sorry — Mr. Dondero said in his own mind that
6 Highland needs to compensate HCMFA, because it HCMFA that was on
7 the hook. So that's in the record.

8 Now by itself, the Court might not find that credible,
9 although the Court can't make that determination. I'll give you
10 other indicia of credibility. What — what both Dondero and
11 Waterhouse testified to clearly and unambiguously is that only
12 Mr. Dondero could authorize Highland or HCMFA to make or take
13 loans on that size at that time. Only Mr. Dondero.

14 Mr. Morris talked about apparent authority because Mr.
15 Waterhouse is the treasurer of HCMFA. Normally he'd be right,
16 that a CFO or treasurer can go out there and presume to have
17 authority to enter into loans of this size. That does not apply
18 when he wears both hats. When an agent is common to two
19 principles, the agent's knowledge is imputed to both. Both
20 principals know what the agent knows. If the agent knows that
21 he can't authorize this on the one, that applies on the other
22 one as well.

23 And we have briefed this at length. There is no point
24 in my hammering on that. But the fact that Mr. Waterhouse was
25 an agent for both means he can't have no apparent authority.

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1 Apparent authority is, again, what someone outside reasonably
2 assumes you'd have. All that he could have was actual authority
3 and he could not have actual authority on his own to take or
4 make loans of this size.

5 So what happens, what both Dondero and Waterhouse
6 testified to is Dondero tells Waterhouse to transfer \$7.4
7 million from Highland to HCMFA. Dondero did not say these are
8 loans. Dondero did not tell Waterhouse why these transfers were
9 happening, except that they were related to TerreStar.

10 Waterhouse did not ask if they were loans, and he does
11 not recall being told that they were loans. What he remembers
12 is Dondero saying, 'Go get the money from Highland.' But, again
13 importantly, to bolster the credibility of Mr. Dondero, not that
14 it needs credibility, what Mr. Waterhouse remembers is that
15 these transfers were related to the NAV error. Were. Nothing
16 at all about a liquidity need on the part of HCMFA. No
17 evidence, no one has said nothing in the record that, wait,
18 HCMFA needs liquidity, so let's transfer funds to HCMFA by way
19 of a loan.

20 All of them remember, Waterhouse, Klos, and Hendrix,
21 that it was related to the NAV error. Again, the NAV error,
22 where Highland caused this liability for HCMFA. That bolsters
23 Mr. Dondero's subjective intent that this transfer be
24 compensation for the harm that Highland caused.

25 Now as Mr. Waterhouse testified at length, these notes

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1 should have gone through the Legal Department. They did not.
2 Instead Waterhouse tells Mr. Klos, at that time the controller,
3 to transfer the funds. That's all he tells him, 'Transfer the
4 funds.' Mr. Klos, and he testified at length about this,
5 testifies about how based on prior practice he, a prudent
6 accountant, a prudent controller, would paper up intercompany
7 transfers as loans or payments on loans – well, not he, but that
8 would be the practice.

9 Mr. Klos doesn't ask, 'Are these loans therefore,' he
10 assumes that they're loans because that's the prior practice.
11 He then instructs Ms. Hendrix, the senior accountant, to go
12 paper them up, and his role is done. Now it is true that on one
13 of those two emails instructing that the loans – that the
14 transfers be papered up, he does copy Mr. Waterhouse. He does.
15 And the debtor argues, well, Mr. Waterhouse should have hit the
16 panic button and said these are not loans. Well, that's some
17 evidence of something. That's some evidence that perhaps Mr.
18 Waterhouse thought that they were loans. But it's just evidence
19 of that. It is not – it is not the magic bullet here. The
20 point again is Mr. Klos testified very clearly that he assumed,
21 based on prior practice, that these were loans. And then Ms.
22 Hendrix likewise testified very clearly that based on prior
23 practice and Mr. Klos' instructions these were loans, and she
24 papered them up as loans. It didn't go through Legal, she
25 papered them up as loans. She never showed the notes to Mr.

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1 Waterhouse, she never brought the end notes to Mr. Waterhouse.
2 That was it. Mr. Waterhouse told Klos to transfer it. Klos
3 told Hendrix to paper it up as loans. And that was it.

4 Next slide, please.

5 Now there is a lot of other circumstantial evidence
6 here that I think a jury should and will consider. And I agree
7 completely with Ms. Deitsch-Perez, Mr. Morris' argument is the
8 best evidence of why the Court cannot grant summary judgment
9 because it kept talking about jury and reasonable jury, and he
10 was making opening arguments. But look at the other
11 circumstantial evidence.

12 There is two notes, two transfers, and two payments by
13 HCMFA for the harm caused. If there is a need for liquidity,
14 why have two notes and two transfers? Highland was bleeding
15 cash at that time. Mr. Dondero – this is in the record –
16 personally put in money into Highland so that Highland could
17 make these transfers to HCMFA. Why would he have done that
18 unless it was for compensation. If HCMFA needed funding for
19 some reason, why wouldn't he have just put money into HCMFA?
20 Why have Highland do it?

21 The promissory notes are in amounts very, very similar
22 to the actual payouts because of the error, 5 million versus 5.2
23 million, 2.4 million versus just under that. In fact, the 2.4
24 million is done on the very same day as the note. Again
25 Waterhouse remembers that this was related to the NAV error.

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1 There is no mention by anyone in their depositions, the debtor
2 hasn't presented any because there is none, that there was a
3 need at HCMFA at that time to transfer money such that this
4 would be a loan. Again, Ms. Hendrix remembers that this was
5 related to the NAV error and the consent fee, so there is a
6 question of fact there. The – the shared services provides for
7 the valuation. Again, this was logical when I put in here it
8 passes the smell test.

9 If Mr. Morris asking the Court to conclude that no
10 reasonable juror could conclude that this is true, I – not only
11 do I respectfully disagree, I utterly disagree. The Court might
12 not find it credible. Mr. Morris might find it incredible, but
13 all that we need to defeat summary judgment are genuine issues
14 of dispute fact. These are all genuine issues.

15 No one is arguing that some space alien came down here
16 and fabricated these promissory notes. That would not be a
17 genuine issue. And, again, nothing went through Legal, nothing
18 was papered up through Legal, nothing was shown to Waterhouse
19 afterwards.

20 Now the big counter argument is, well, how could Mr.
21 Waterhouse carry these on the books for months and months, how
22 do he file MORs. This is all just a lie, Judge. This is an ex
23 poste facto lie. Again, questions of fact. But let's look at
24 Mr. Waterhouse's understanding after the fact.

25 The email, Julian. So – slow down a little bit more.

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1 So – so Your Honor has this, we've addressed it. What
2 is being discussed here is the retail boards are asking of the
3 advisor, HCMFA, amongst other things, are any amounts currently
4 payable or due to the debtor by HCMFA. What you see then from
5 Lauren Fedtherd (phonetic), and she's copying various people
6 whose names you've gotten to know, she talks about HCMFA, due to
7 HCMLP of June 30th, 2022, 12 million and change, per the top.

8 Look at how Mr. Waterhouse responds. The man who
9 signed these notes allegedly a little over a year earlier, he's
10 going off memory here, he says the HCMFA note is a demand note.
11 There was an agreement between HCMLP the earliest they could
12 demand is May 2021. That's completely wrong. And why is it
13 wrong? Because there are four HCMFA notes, Your Honor. There
14 were two prior notes – we have briefed this. We have given you
15 copies. The debtor has sued HCMFA for these two prior notes –
16 where the maturity was extended to May 2021, which is the why
17 the debtor only filed suit on those notes after that maturity
18 passed.

19 So again here is the CFO, who Mr. Morris has told you,
20 and the Court, I heard the Court say should have known better,
21 calling the HCMFA note a note instead of promissory notes, and
22 saying that the earliest it could be demanded is May 2021.

23 Close this and pull up the Rule 15(c), Julian.

24 We're going to look at just the top of this Rule
25 15(c), Your Honor, because it contains highly confidential,

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1 proprietary information, but this is the report that Mr. Morris
2 told you that HCMFA sent to the retail boards where they concede
3 and admit that they owed this money.

4 Scroll down, Julian. Keep scrolling. Keep scrolling,
5 please. Okay.

6 So there are any material amounts currently payable or
7 due. So here again, now this is the whole Legal and Accounting
8 Department at Highland, Ms. Fedtherd, Mr. Klos, Ms. Hendrix, Mr.
9 Waterhouse. You saw them all on that email. None of them
10 remembered, oh, wait, oh, wait, these notes have not been
11 extended to May 2021; oh, wait, there's more than one note.
12 Again, it talks about the note between HCMLP and HCMFA and it
13 talks about coming due in May 2021. Again, that's not correct.

14 And the debtor has never explained why the numbers
15 don't add up. Why does it say that HCMLP – I'm sorry, where is
16 it here – the twelve million two hundred and eighty-six
17 thousand, Your Honor. So there were the two notes are the
18 question here for 7.4 million and there were two other notes
19 which – it's in my brief, I forget right now, but the total
20 amount is quite a bit higher than \$12.286 million.

21 No one has ever tried to explain to Your Honor why
22 these professional people, if they believe and know of the
23 existence of four notes, can't do simple math and add up four
24 principal amounts owing – you can close this. The point of me
25 saying that, Your Honor, is it's very easy in hindsight for Mr.

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1 Morris to argue and for, frankly, the Court to assume that Mr.
2 Waterhouse and his team did know about these notes, that they
3 were always reported in the bankruptcy and that this is just us
4 trying to weasel out of a lawful debt after the fact. That is
5 not correct, Your Honor. That is not correct because, as I've
6 shown you, that's just a small sampling of our evidence.

7 These two notes are different. These two notes are
8 different and they're different because the amounts are very
9 similar to the prior HCMFA notes. These two notes are different
10 because there were two prior HCMFA notes. Everyone knew that
11 there were two prior HCMFA notes. Everyone would have recalled
12 that and they would have put it in financials. They would have
13 put it on Rule 15(c)s. They would have put it on the bankruptcy
14 schedules. That does not mean that they knew about these two
15 notes, that they knew that there were in fact four notes.
16 People were confused. They were confused for many reasons
17 because this had to do with TerreStar, it had to do with the
18 same numbers as was paid out to TerreStar.

19 And the jury, a reasonable jury can conclude that all
20 these people that are now telling you that Mr. Waterhouse should
21 have been perfect and Ms. Hendrix should have been perfect and
22 Mr. Klos should have been perfect and Ms. Fedtherd should have
23 been perfect, that they made a simple mistake. And that mistake
24 was that these promissory notes were never intended to be debt.
25 Mr. Waterhouse didn't register them as such in his mind. And

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1 that's why you see mistake after mistake of how they're carried.

2 And, finally, yes, there are repeated instances of the
3 debt from HCMFA being recorded, but it's also all debtor
4 employees. Of course Ms. Hendrix, who prepared the notes,
5 assuming that they were loans, would have recorded that. Of
6 course Mr. Klos, who told her to do that, assuming that they
7 were loans, would have recorded that. That's evidence of
8 nothing. That's not evidence that there was a mutual mistake.
9 That's evidence that the people who caused the mistake did so in
10 good faith and didn't defraud anyone.

11 And the final point is the debtor makes a big deal
12 about how my client received \$5.1 million from the insurance
13 company to pay part of the liability for this error. We have
14 briefed out in some detail the collateral source rule in Texas.
15 That rule allows you to have a double recovery. That rules says
16 you can recover from an insurance company and from the
17 tortfeasor without any kind of problem. And it exists and it's
18 existed for over a hundred years because people can go out there
19 and pay for insurance and are responsible, not insurance pays,
20 that should not be relieving the tortfeasor of its liability.
21 So that's a red herring.

22 And, really, if Highland believes that we did
23 something wrong with the insurance carrier, then it can go and
24 talk to the insurance carrier.

25 Fact, Your Honor, there was a NAV error. Fact, it

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1 caused my client to pay over \$7.4 million in damages. Fact,
2 there is two transfers of about that amount. Arguable fact, Mr.
3 Dondero instructed that this be compensation. Arguable fact,
4 Mr. Waterhouse knew about it.

5 Now pull up my PowerPoint, Your Honor – Julian.

6 My final point, Your Honor, my time is almost up.
7 This is now the authority. This is a very important point.

8 Go down, please.

9 Okay. So – so let's talk about the authority now. We
10 – I mentioned earlier the UCC. Here, Your Honor, I have quoted
11 the relevant portion. It's the Texas version, 3.308(a): In an
12 action with respect to an instrument, the authenticity and
13 authority to make – that's clear – and authority to make each
14 signature on the instrument are admitted unless specifically
15 denied in the pleadings.

16 If the validity of a signature is denied in the
17 pleadings, the burden of establishing validity is on the person
18 claiming validity.

19 I'm not talking about the Waterhouse signature, Your
20 Honor, now. I'm talking about just the authority. In our first
21 amended answer, as I walked you through before, we expressly
22 denied, specifically denied that Waterhouse had the authority to
23 make the promissory note on behalf of HCMFA. Because that's
24 denied in the pleadings, the burden of establishing validity is
25 on the person claiming validity, HCMFA. There is zero evidence

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1 before Your Honor from the debtor that Mr. Waterhouse was
2 authorized by the debtor or by HCMFA to execute these notes.
3 Certainly Klos and Hendrix weren't. Those were lower-level
4 employees, those were not officers. There's no argument that
5 they were.

6 The burden is on Highland to prove that Waterhouse had
7 actual and/or apparent authority to sign these notes. There is
8 nothing in the record to prove that, Your Honor, because again
9 the mere fact that this being an officer doesn't matter. And
10 both Dondero and Waterhouse testified that Waterhouse did not
11 have that authority. So for that reason, if no other reason,
12 Your Honor, the Court cannot recommend granting summary judgment
13 because there is a fatal flaw of evidence on the part of the
14 debtor.

15 Again the debtor assumes, 'Well, he is the officer, he
16 can do it.' Uh-uh, because he's wearing both hats. Thank you,
17 Your Honor.

18 THE COURT: All right. Thank you.

19 All right.

20 MR. MORRIS: Your Honor, may I — may I request just a
21 very brief break before I give my rebuttal, which I don't expect
22 to last the whole 55 minutes that I have?

23 THE COURT: I need a break as well —

24 MR. RUKAVINA: May we make it 10 minutes, Your Honor?

25 THE COURT: We'll make it 10 minutes right.

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1 COURT SECURITY OFFICER: All rise.

2 MR. MORRIS: So we'll come back at the top of the
3 hour?

4 THE COURT: We'll - yeah, it's 3:48, let's just make
5 it four o'clock we'll come back.

6 (Recess taken.)

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: All right. Please be seated.

9 We are back on the record in the Highland note
10 adversaries.

11 Mr. Morris, do we have you?

12 Looks like I'm on mute. Am I on mute?

13 All right. Hello. I was muted apparently. We're
14 back on the record in the Highland note adversaries.

15 Mr. Morris, are you ready for your rebuttal?

16 MR. MORRIS: I think so.

17 Ms. Canty, are you all set?

18 MS. CANTY: I am.

19 MR. MORRIS: Okay. So good afternoon, Your Honor.

20 John Morris, Pachulski, Stang, Ziehl and Jones, for Highland
21 Capital Management, L.P. I understand I have 55 minutes for my
22 rebuttal. I'm hopeful not to take so long.

23 I want to begin my rebuttal where I began with my
24 opening argument since I guess I was accused several times of
25 not citing to the law, so I thought I'd cite to the law again.

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1 We're entitled to summary judgment if there is no
2 genuine dispute of a material fact. A dispute about a material
3 fact is genuine only if the evidence is such that a reasonable
4 jury could return a verdict in favor of the nonmoving party.
5 And that's why I referred to the jury, not because I was making
6 a closing argument, but because that is merely what the legal
7 standard is.

8 We can meet our burden by demonstrating either an
9 absence of evidence to support the nonmoving party's claims, or
10 in this case defenses, or by showing that there is an absence of
11 genuine issues of material fact.

12 The defendants here have to do more than create some
13 metaphysical doubt as to material facts. They can't satisfy
14 their burden by relying on conclusory allegations,
15 unsubstantiated assertions, or a scintilla of evidence.
16 Critical – where critical evidence is so weak or tenuous on an
17 essential fact that it couldn't support a judgment in favor of
18 the nonmovants or where it is so overwhelming that it mandates
19 judgment in favor of the movant, summary judgment is
20 appropriate. We believe that we easily meet that standard,
21 notwithstanding all the moles that I'm going to try and whack
22 now, as this is what I do for a living now. I whack moles. So
23 I'm just going to begin with some of the assertions that were
24 made by the first lawyer who spoke.

25 So it's not in any particular order because it's kind

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1 of hard to do that on a 10-minute break. But you know they make
2 the assertion again that there was a practice of forgiving
3 loans. Your Honor, it's actually not a material point. I don't
4 believe that whether or not it was a practice is material to
5 this analysis, but they put it into their answer, and that is
6 why we have pursued it.

7 I think the documentary evidence speaks for itself.
8 Mr. Dondero as well as somebody else, I forget, testified that
9 if a loan was forgiven, it should be recorded in the financial
10 statements. We have put forth I think the 10 or 11 years of
11 financial statements that existed prior to the bankruptcy
12 filing, and what they show is that no loan was forgiven for at
13 least seven or eight years. We're not saying that no loan was
14 ever forgiven in the history of the world, but what we're saying
15 is when you don't do something for seven or eight years, kind of
16 hard to call it a practice.

17 And what makes it even more interesting, Your Honor,
18 not to spend too much time on a point that I don't even think is
19 material, but I just — I've got to whack the mole, no loan was
20 ever forgiven for Mr. Dondero than \$500,000.

21 And I'd like to put up on the screen, Ms. Canty, I
22 think Exhibit 24, because it's important, because this is where
23 credibility starts to come in.

24 And I'm not talking about the credibility of the
25 witnesses, I'm talking about the credibility of the lawyers.

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1 Because in their reply they said Highland conceded that Mr.
2 Dondero had a loan forgiven. And they reach that conclusion
3 because we carefully wrote in our moving papers that Mr.
4 Johnson, Mr. Dondero's expert, testified that he was not aware
5 of any loan prior to 2008, because we only put the financial
6 statements up to 2008, we didn't put any earlier statements, so
7 when we write, there's no evidence that Mr. Dondero received a
8 forgivable loan prior to 2008, we're just trying to be careful
9 and show what the evidence is. And they turn that around and
10 they say, see, Highland has conceded that Mr. Dondero received a
11 forgivable loan prior to 2008.

12 Let's see what Mr. Dondero said in response to these
13 interrogatories. If we could go – keep going, because I think
14 this is – this is so important. It goes to the credibility of
15 the presentation here. This is called whack a mole. So keep
16 going. Cross my fingers and hope it's 24. Keep going. It's 24
17 – I'm sorry. It's Request for Admission Number 15. It's page
18 11. Keep going. No, it's right there.

19 So they say Highland conceded that Mr. Dondero
20 received a forgivable loan. It's interesting, when we asked Mr.
21 Dondero to admit that Highland never gave him a loan that was
22 actually forgiven, he admitted it.

23 We asked him did Highland ever give – to admit that
24 Highland never gave Mr. Okada a loan that was ever forgiven, he
25 admitted it. We asked him "to admit that Highland never gave a

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1 loan to any entity, directly or indirectly, owned or controlled
2 by you that was actually forgiven," he admitted it.

3 Okay. So those are the undisputed facts, to the
4 extent the Court is at all interested about the so-called
5 practice, Your Honor can decide whether or not it constitutes a
6 practice. The facts are the facts. The facts are no loan was
7 ever given to Mr. Dondero that was forgiven. The fact is that
8 no loan was ever given to one of his entities that was ever
9 forgiven. The fact is that no loan was ever given to anybody
10 that was ever forgiven since probably 2010.

11 Nancy Dondero's competence, I really didn't want to
12 address the issue because I thought we had – you can take that
13 down – we had covered it pretty extensively in our briefing, and
14 I had no interest in embarrassing Ms. Dondero, but I hope and
15 assume that Your Honor has read the transcript. I'm not talking
16 – Highland is not saying that she was drunk. Highland is not
17 saying that she is not mentally capable of living, right. We're
18 not using Competency with a big C, we're using competency as a
19 small c because they're going to have to put her in front of a
20 jury. And, again, the standard is, is there any way a
21 reasonable jury is really going to buy the story?

22 The evidence speaks for itself, her testimony speaks
23 for itself. I may be a mediocre litigator, but of this somebody
24 asked me to create a tax structure for the maximization or the
25 minimization of taxes, I would not be competent to do that. I

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1 may be a mediocre litigator, but I wouldn't be competent to do
2 that.

3 I don't believe, based on the testimony, again not a
4 credibility finding, based on facts, on the facts that she asked
5 no questions, on the fact that she didn't negotiate, on the fact
6 that she never saw the notes, on the fact that she couldn't
7 identify the makers of the notes, on the fact that she asked no
8 questions about the very terms of the agreement. The agreement
9 was he would get the bonus if the assets were above cost. She
10 asked no questions.

11 Had she asked questions she would have learned they're
12 already in the money, substantially above. That's what we mean
13 by competence. and it's just something that the Court should
14 consider as to whether or not a reasonable jury could ever
15 credit that testimony.

16 You know, Ms. Deitsch-Perez spent a lot of time
17 telling Your Honor how benevolent Mr. Dondero is. Absolutely no
18 evidence in the record to support that. She spent a lot of time
19 telling you how much he could have taken in compensation but he
20 didn't because - he took \$70 million in the three years before
21 the bankruptcy. He took it in the form of a loan, but he took
22 \$70 million and he doesn't want to pay it back. That is the
23 undisputed fact. He took it and the entities that he owns and
24 controls took it. They took the money and they don't want to
25 give it back.

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1 And the only reason he took it in the form of a loan,
2 — she said it — tax maximization, because he didn't want to pay
3 income taxes on it. He took the money and he thought he would
4 never have to pay it back, because that's Jim Dondero. Not a
5 benevolent man. He took \$70 million.

6 I went through that whole slide where I said there
7 were seven or eight opportunities for him to act in his own
8 self-interest, and the only rebuttal I got was: Mr. Dondero put
9 the company ahead of his own self-interest. It actually would
10 have been in the company's interest as well as his own if he had
11 disclosed the agreements to anybody when they were entered into.
12 If he had disclosed them to the auditors, if he had disclosed
13 them to this Court, if he had disclosed them to the creditors,
14 if he had disclosed them at confirmation, if he had disclosed
15 them in response to the projections, if he had disclosed them in
16 response to the demand letters. His failure to do that isn't
17 some magnanimous act of — of, you know, benevolence, acting out
18 of self-interest. That was literally the rebuttal, that it was
19 a sacrifice and he — he — that he didn't disclose it. I don't
20 get it. No reasonable jury, right, you're going to put this to
21 a jury? Didn't act in his own interest and didn't act in
22 Highland's interest.

23 Highland's creditors would have been much better off
24 if Mr. Dondero had actually disclosed, if he was compliant, if
25 he was a compliant officer, if he was part of a compliant

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1 company, he wouldn't have allowed monthly operating reports to
2 be filed that, according to him, falsely claimed that Highland
3 actually had notes of the value that they were disclosed at.

4 The sausage-making. Undisputed facts. Undisputed
5 facts how it developed. Yes, I agree with Ms. Deitsch-Perez,
6 everybody overlooks things. I do. It's why we didn't produce
7 that – that thing, because nobody followed up and we didn't
8 think about it and you do a million things, and those things do
9 happen, but how can you possibly explain that you sat down to
10 create a list of people who have knowledge and information about
11 this case and you come up with 15 people and you forget your
12 sister who is the principal witness in the case? How do you
13 respond to an interrogatory that says, "Please identify all the
14 people who have knowledge about the alleged agreement," and you
15 forget your sister? That's not an oversight.

16 I think the two excuses that we got were they were too
17 busy doing things and there were too many cooks in the room.
18 Does a jury really need to consider that? Okay, take it – take
19 the totality, take this in totality.

20 You asked Ms. Deitsch-Perez, and I – just to go back
21 to the law, you're right, what I did, Your Honor, is because I'm
22 confident that the Court is very familiar with the standards for
23 summary judgment, I highlighted the standards because I think
24 it's important to put in context the argument that we're making
25 here today, what I didn't do is go through cases because there's

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1 no case like this, and Ms. Deitsch-Perez effectively not only
2 agreed with that, but you asked her a much broader question, are
3 you aware of any case where a court allowed a maker to rely on
4 an oral agreement to get out of from under an unambiguous
5 promissory note, and she bobbed and she weaved, but I didn't
6 hear an answer, Your Honor. Maybe you did, I did not hear an
7 answer.

8 Certainly no case that I'm aware of where parties to
9 an oral agreement are siblings, where they've got just the
10 mountain evidence, right, that's – that's part of what the Fifth
11 Circuit says look to, is there a mountain of evidence. The
12 mountain of evidence that no agreement exists is just absolutely
13 overwhelming. There is not one scintilla of evidence, frankly,
14 other than the words out of Jim and Nancy's mouth that supports
15 this theory.

16 I want to talk for a second about – about PWC. The
17 assertion was made again to minimize the undisputed fact. The
18 undisputed fact is that Mr. Dondero did not disclose the
19 agreement to PWC. The undisputed fact is that paragraph 36 of
20 the representations required Mr. Dondero to disclose whether
21 material or not as decided by PWC that the agreements existed
22 because they were related-party agreements. And what Your Honor
23 was told was, ah, maybe it's a bad judgment call not to disclose
24 it. Maybe in hindsight, he should have done it.

25 He's a CPA. These are management representation

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1 letters. The representation was unambiguous. Mr. Dondero
2 breached his representation and the audited financial statements
3 are false and misleading as a result, okay. It's not a question
4 of bad judgment. What it goes to is it shows no agreement
5 existed because if an agreement existed, it wouldn't have been
6 good judgment to tell PWC. It would have been required. And a
7 compliant executive and a compliant company would have disclosed
8 it to their auditors.

9 The Jim and Nancy show on – on this agreement, again
10 not a scintilla of evidence other than what that case said,
11 self-serving conclusory allegations. You know, the fact of the
12 matter is Jim Dondero couldn't identify the notes if he tried.

13 And I do want to take this opportunity, Your Honor, we
14 haven't discussed this, maybe I should wait for this, but
15 Exhibit 3C, I've – I've got a few objections to their exhibits,
16 just three actually, and then one proposal. But one of them
17 goes to this list of the promissory notes. And if Your Honor
18 read Mr. Dondero's testimony from his deposition, he couldn't
19 identify the notes that were subject to the agreement without
20 this cheat sheet, which is Defendants' Exhibit 3C, and it was
21 prepared by lawyers for litigation. And it should absolutely
22 not be admitted into evidence.

23 He couldn't identify the notes that were the subject
24 of the – of the alleged agreements. And this is critical,
25 because it is an absolute critical term of the agreement, to

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1 identify what notes do they apply to. And the reason that it's
2 critical, Your Honor, is because there were a whole host of
3 other notes that aren't part of this litigation. We know there
4 were two other HCMFA notes, because we're suing on them. And we
5 know that there were other notes of Jim Dondero that he paid off
6 in the interim, right. And that's why they're not part of this
7 litigation, but the evidence is well in the record.

8 And so it's not a situation where you could say, look,
9 we had 10 notes, you sued on 10 notes, so of course the 10 notes
10 are the subject of the litigation and it's the subject of the
11 agreements, because those are the only notes. You can't do that
12 here. There's lots of other notes. So if he can't specifically
13 identify, because they didn't write it down, it's all undisputed
14 facts, didn't write anything down, didn't create a list of
15 notes, nothing. I think he's missing a critical term in the
16 agreement and I think that's another reason why this thing
17 shouldn't – you shouldn't burden a jury with this fraud – with
18 this story.

19 Again, nothing corroborates their story. Ms.
20 Deitsch-Perez referred to her experts. Respectfully, the tax
21 law expert is irrelevant. I would stipulate you don't pay taxes
22 until you have income. That's what he says. It's not – it's
23 not terribly sophisticated, it's not at all – contested at all,
24 frankly.

25 The important one is Mr. Johnson, and why is Mr.

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1 Johnson so very critical to this case? Because it blows
2 everything Ms. Deitsch-Perez said away. And how does it do
3 that? Because by Mr. Johnson's calculation going back seven
4 years, Mr. Dondero was only under – only under compensated,
5 taking his analysis in full, by \$20 million. It was by \$1.7
6 million for the three years prior to the petition date, but he
7 went back seven years, and it's in the record. I asked him how
8 did you come up with seven years, is that subjective. Yes.
9 Could have been five years, then the number would have been
10 smaller. Could have been 10 years, then the number could have
11 been bigger.

12 But just take his analysis at face value. There is no
13 rhyme or reason why he picked seven years, but take seven years.
14 Mr. Dondero was under compensated by \$20 million. Why is he
15 entering into agreements for \$70 million? Benevolent? I don't
16 think so. He helps our case. And the fact is the evidence is
17 undisputed. If you look at Mr. Johnson's deposition, Mr.
18 Dondero failed to disclose to Mr. Johnson tens of millions of
19 dollars that he got in additional deferred compensation. No
20 dispute about it.

21 So if you took Mr. Johnson's \$20 million and you took
22 into account the compensation that Mr. Dondero failed to share
23 with his expert, that number comes closer to 10,-, maybe even
24 less. Over seven years, based on Mr. Johnson's analysis, that's
25 what he was under compensated for.

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1 This may be my favorite of all. They attempt to
2 dispute our assertion that Mr. — that, you know, there was never
3 any disclosure of the agreement, and they point to two examples.
4 I'm just going to read for a moment, Your Honor, it's page 11
5 from our reply brief that was filed in Adversary Proceeding
6 21-03003, at Docket 159, and we address this very briefly. With
7 two irrelevant exceptions, defendants do not dispute that
8 neither Mr. Dondero nor his sister ever told anybody about the
9 existence or terms of the alleged agreements. And I have a
10 citation here: Compare our motion at paragraph 28 with the
11 opposition at a couple of places.

12 And I'm going to address now the two exceptions that
13 Ms. Deitsch-Perez focused on. The two exceptions are irrelevant
14 because they are vague, self-serving statements insufficient to
15 create a genuine dispute of material fact. The first one I cite
16 to is Mike Lynn's (phonetic) letter that she referred to. We
17 also object to that exhibit only to the extent that it's being
18 offered for the truth of the matter asserted. But with that, we
19 would encourage the Court to read that letter. That's a letter
20 that was sent after we commenced the lawsuit. It doesn't use
21 the word — it doesn't use the word agreement, forgiveness,
22 contingency, condition subsequent, Nancy, or Dugaboy. It merely
23 expressed Mr. Dondero's, quote, views that the notes were
24 compensation.

25 And then there's Mr. Waterhouse. Even accepting Mr.

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1 Dondero's statements as true, Mr. Dondero's spoke to Mr.
2 Waterhouse only in the context of settlement discussions, and he
3 failed again to say the words agreement, forgiveness,
4 contingency, condition subsequent, Nancy, or Dugaboy. Given Mr.
5 Dondero's own words, his assertion that he, quote, did not
6 discuss every detail of the agreements with Mr. Waterhouse is to
7 be quite charitable. An extraordinary under statements. He
8 admittedly did not discuss any detail of the alleged agreement
9 with him, and we cite to the record there. So that can be found
10 on page 11 of our reply brief. That is the entirety of the
11 disclosures that they're relying upon.

12 Mr. Rukavina, he first addressed the issue of prepays.
13 We don't dispute that there were prepayments. He kept citing
14 Ms. Hendrix and Mr. Klos' admission that there were prepayments.
15 I don't dispute that there's prepayments. The question becomes
16 what is the agreement of the parties and what did they actually
17 do. I mean I think at the end of the day the agreement of the
18 parties carries it, but let's look at both, okay.

19 We encourage you, we urge you, Your Honor, because I
20 can't — I can't whack, I can't do every single thing right here,
21 but please look carefully at the language Mr. Rukavina suggested
22 that there is an ambiguity. This is the first I've ever heard
23 of that. The fact of the matter is the provision in the term
24 notes couldn't be clearer: The parties could renegotiate and
25 the — and the maker could repay. And it says very clearly: If

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1 you prepay – may have said repay – I meant prepay – if you
2 prepay, the parties' agreement says exactly how that is going to
3 be treated. You prepay and then the money gets applied to
4 outstanding, accrued but unpaid interest, and then the balance
5 goes to principal. It's really like any other loan that I know
6 of, but I'm not here to testify.

7 So think about that, Your Honor: Interest accrues
8 every single day. The amortization schedule shows that interest
9 is charged every single month, for whatever reason, and I don't
10 think the Court needs to weigh why did they prepay. Who needed
11 the money? Did Mr. Dondero do this, did somebody else do this?

12 Just look at the plain and unambiguous terms of the
13 agreement, and then look at the amortization schedules. I think
14 Mr. Klos' declaration will be particularly helpful because he
15 rebuts everything that Mr. Rukavina tried to argue in order to
16 attempt to create an addition – a genuine issue of disputed
17 fact.

18 But I would ask Ms. Canty to put up on the screen the
19 entirety of the NexPoint amortization schedule, because Mr.
20 Rukavina focused on the very first point and then conveniently
21 said, 'I don't want to go through the rest of it,' and there is
22 a reason for that, because if you read Mr. Klos' declaration
23 he's going to tell you that in May 2018, they did exactly what
24 they're contending to now, right? So you can see in May 2018,
25 they make a very large payment, and the payment is, in fact,

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1 interest continues to accrue. That's the interest-accrual line,
2 right?

3 Then if you just scroll down very slowly, please.

4 Okay. You will see – you will see that at the end of
5 the year, if you add up the \$149,000 plus the \$84,000, you know,
6 they paid – they paid \$200,000, and it got applied to
7 outstanding – here's a prepay of 13 days. So that at the end of
8 the year, you get to zero.

9 Keep going.

10 So notwithstanding the fact that they've paid millions
11 and millions of dollars during 2018, exactly what the agreement
12 says, they apply it – except for that May 18 application, Mr.
13 Rukavina is right to point that out, but he's wrong to ignore
14 the rest of it. So – too fast, go back to the top – and you can
15 see every single time, Your Honor, if you add up the 275,- that
16 was the interest that was due on 2/28, plus the 135,-, the
17 interest that was accrued at the end of March, if you add those
18 two together, it will equal the 411,-. And if you add the
19 411,-, and then the balance is paid to principal. That's Your
20 \$750,000. Interest continues to accrue for the balance of
21 March. And then you get to April.

22 I'm not going to debate about why the payment was made
23 or what was intended. What we know is that they paid \$1.3
24 million. What did they do? They applied that to the
25 outstanding interest, \$9,000 plus \$73,000 equals \$83,000, and

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1 the balance went to principal, period, full stop. Interest
2 continues to accrue. They continue to do the same thing. They
3 continue to do the same thing.

4 I need not go through every one of these , Your Honor,
5 but here you are, you have now in 2019, you've paid seven
6 fifty-one three two one, so that's, what, about four four,
7 that's about \$6 million. And, lo and behold, notwithstanding
8 the payment of all of that, right on August 13th, they make
9 their last prepayment of the year, interest continues to accrue
10 such that at the end of the year, on November 30th there was
11 \$412,000, on – in December there was another \$113,000, so they
12 pay the 530,-, and again there's one day of interest. I guess
13 this is their gotcha moment. They prepaid, see they prepaid one
14 day. They got them to the end of the year to zero. Every
15 single time in 2019, they do exactly what the contract says,
16 they receive a prepayment, they apply it to outstanding
17 interest. Outstanding, accrued but unpaid. Mr. Rukavina didn't
18 seem to understand how there could possibly be accrued but
19 unpaid interest on prepayment because you're paying the interest
20 that exists as of the date of the payment. It's really not
21 complicated.

22 2020, made another payment, applied in exactly the
23 same way. I don't know why he's doing this. It doesn't really
24 matter. It's applied exactly as the unambiguous terms of the
25 term notes provide: 412,000 plus the 113,-, right, it leaves

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1 you with 530,-. Again, it took you to the end of the year.

2 And it goes on. And the same thing is true. You
3 know, nobody's made the argument, nobody's put up the – the
4 amortization schedule for HCMS, but the same thing is true. You
5 know, at the end of 2019, notwithstanding the payment of all the
6 millions of dollars, they still had to pay the interest that was
7 due. That's the same interest that was due at the end of 2020.
8 It's the exact same thing. The terms of the term notes are
9 clear and unambiguous as to what happens when there is a
10 prepayment, the parties could do something different, as Mr.
11 Klos testified in his deposition – in his declaration, there was
12 the one instance where they did something different, but they
13 didn't do anything different at any other time. And all of
14 these payments, were on the 13-week forecast. So that takes
15 care of prepayment, I believe. The language is unambiguous and
16 the practice was also pretty darn clear.

17 I heard a lot of references to equity. I don't get
18 it. The parties' contract governs here. This is – I understand
19 that the bankruptcy court is considered a court of equity here,
20 but there is no equity here. The equity is making sure that
21 Highland recovers the assets that under Jim Dondero's watch were
22 reported to its creditors as being valid assets of the estate.
23 That's the equitable piece that the Court should take into
24 account if it's considered equity at all.

25 Let's go to the next. The next argument was the

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1 shared services agreement. You can take that down.

2 You know, God bless him. He put up – he put up the
3 shared services agreement. The shared services agreement, he
4 focused on assistance and advice, and said it even includes
5 accounts payable. We don't dispute, we don't dispute that
6 Highland's accounting department effectuated payments. The one
7 thing that Mr. Rukavina didn't do that they've never done, that
8 they will never be able to do is show you where in the agreement
9 Highland had not just the authority but the actual obligation to
10 make these payments. It doesn't say it. And I think that is
11 the end of the inquiry. I believe that the Court can rule as a
12 matter of law that this –

13 (Voices on audio.)

14 THE COURT: Who was that?

15 THE REPORTER: That's someone calling in, Judge.

16 THE COURT: You don't know who the caller –

17 MS. DEITSCH-PEREZ: Somebody is unmuted and there's
18 noise in the background.

19 THE COURT: Okay.

20 THE REPORTER: It's a number, I've muted them.

21 THE COURT: It's a – we've muted them. It's a number,
22 we don't know who that was.

23 All right. Go ahead, Mr. Morris. I'm sorry.

24 MR. MORRIS: So – so you can rule as a matter of law,
25 Your Honor, I believe very quickly and very easily that there is

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1 no obligation, right, that Highland wasn't authorized, let alone
2 obligated to make these payments on behalf of third parties.

3 To the extent the Court needs it, the – I will
4 stipulate that Highland assisted in effectuating payments that
5 were approved by Jim Dondero or Frank Waterhouse. Again,
6 Exhibits 3D and 3F – 3D and 3E are a litany of December 2020
7 emails from Kristen Hendrix to Frank Waterhouse that says:
8 Please, sir, do you approve these payments before I make them.

9 So there's no question from the documentary evidence
10 that Kristen Hendrix always believed that she needed Frank's
11 approval to effectuate these payments. And of course there's
12 the 13-week forecast, so nobody – right, you've heard so much
13 testimony about 13-week forecasts, there's no dispute that
14 13-week forecasts were prepared. There's no dispute. It's, you
15 know, in our papers, it's in Mr. Klos' declaration that these
16 forecasts fully disclosed the interest payments that were due at
17 year-end. You know it is what it is.

18 You know what, can we put up Exhibit 3E, just to
19 emphasize the point for just a moment, because Mr. Rukavina, I
20 think, suggested, oh, you know, Mr. Waterhouse was wearing his
21 Highland hat when he got these emails. I don't know – it's
22 argument, right, and the Court needs to distinguish argument
23 from facts.

24 Here is the fact. Here is December 31st. Jim Seery
25 is the one who approved payments on behalf of Highland. Jim

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1 Seery did not approve payments on behalf of the advisors or
2 HCMFA or HCRE. That was Frank Waterhouse's responsibility. Not
3 in his capacity as Highland's CEO, because if that was true you
4 wouldn't need Jim Seery, right? Approved by Seery. Mr. Seery
5 is approving everything. So final nail in that coffin.

6 Cure, - you can take that down now - cure, I heard
7 argument, you know, cure that now somehow Mr. Waterhouse, who
8 can't do anything for the advisors is somehow going to be the
9 person to bind Highland to a cure. Again, Your Honor, I would
10 just urge the Court to look at the four corners of the parties'
11 agreement as reflected in the term note. There is no right to
12 cure, right. There just isn't, period, full stop.

13 I think - I think the record is clear, Mr. Dondero
14 heard on the 14th that Highland was going to seek to collect
15 these notes, and he panicked. And he called up and he screamed
16 at Frank Waterhouse, in the record, he said make the damn
17 payments, and he did. Pardon my language. And he did. There's
18 no evidence of cure. There's nothing in their answer that ever
19 suggested that. It's not a defense.

20 You would have heard about that at confirmation,
21 because these payments are made in mid-January. If he had cured
22 this, right, remember the undisputed facts are that: We amended
23 our projections to say we're going to collect on the term notes
24 in 2021, because we had just commenced these lawsuits. These
25 lawsuits were commenced on January 21st. If Mr. Dondero

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1 actually believed at the time that Frank Waterhouse somehow
2 bound the debtor to this cure, what better time to raise that
3 than at confirmation. His silence, what reasonable jury is
4 going to buy that. What reasonable jury is going to believe
5 that he believed that he cured, and he just forgot to tell you,
6 Your Honor, at confirmation about that. I don't think any
7 reasonable jury will do that.

8 Let's be clear, let's move on to HCMFA. It's kind of
9 cute. But, you know, the notion that Mr. Dondero authorized the
10 transfers as – with compensation is an issue that came up for
11 the very first time in opposition to the motion for summary
12 judgment. If you review Mr. Dondero's transcript, if you review
13 Mr. Waterhouse's transcript, and if you look at our motion for
14 summary judgment which summarizes that – those facts, you will
15 see that the undisputed evidence until we got Mr. Dondero's
16 declaration in opposition to summary judgment, Mr. Dondero told,
17 and this is how I started the day, Mr. Dondero told Mr.
18 Waterhouse to make the transfer. He didn't tell it should be a
19 loan, but he didn't tell them it should be compensation.

20 And, you know, don't take my word for it, Your Honor.
21 Go back and read HCMFA's motion, their second motion for leave
22 to amend, and look at Step 1 of Mr. Rukavina's parade of
23 horrors, how assumptions came to be snowballed, I think he
24 used the word. Look at Step 1. Mr. Rukavina, when he wrote
25 back, didn't say anything about Mr. Dondero giving an

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1 instruction to make the transfer as compensation. He simply
2 says: Mr. Dondero didn't say to make it a loan, he said make it
3 a transfer.

4 And so, again, in opposition to summary judgment,
5 violating the cardinal rule, throwing out unsupported,
6 uncorroborated, conclusory statements. Not permissible. He
7 didn't have the authority, like by what? By what? Is there –
8 is there a document that clipped his wings? Because that's not
9 what Mr. – that's not what Mr. Waterhouse told Mr. Sauter during
10 the interview. He didn't say, 'I don't know. I don't know
11 where that came from. I never would have authorized that,'
12 right? This is the changing story whack a mole that I've been
13 dealing with for 15 months now.

14 You should – you should take seriously what Mr.
15 Waterhouse told Mr. Sauter in the spring of 2021. That is
16 probably the most credible piece of evidence that exists as to
17 Frank Waterhouse's views on all of this. I encourage the Court
18 to read carefully my examination of Mr. Norris, who was the
19 30(b)(6) witness, I believe, and then – and then the examination
20 of Mr. Sauter at the motion, because the one thing that's
21 crystal clear is Frank Waterhouse knew exactly what these notes
22 were, he knew exactly when they were created, and he knew
23 exactly why they were created. All of this stuff about the he
24 said/she said, the rest of it, he's the person whose name
25 appears on the notes. He's the officer. He's the fiduciary.

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1 And, you know what, he's still there. So Frank Waterhouse, who
2 consistently engages in the parade of horrors, that his
3 employer alleges, right? That — I mean you're the ones who keep
4 coming after Frank, right? Frank signed this or his signatures
5 appear without authority. They're the ones who keep coming
6 after Frank. And yet he's still employed. Another kind of
7 interesting issue.

8 The NAV error, Your Honor, I understand that they
9 think they're entitled to windfall, but I just want to read from
10 Exhibit 182, which is the contemporaneous memo that the advisor
11 sent to their client relating to the NAV error to make sure that
12 it's clear, and you can read this. It's Exhibit 182. All about
13 the NAV error.

14 "The advisor and Houlihan Lokey, an independent,
15 third-party expert valuation consultant, approved by the board"
16 — that would be the retail board — "initially determined that
17 the March transaction were, quote, nonorderly, close quote, and
18 should be given, quote, zero weight, and close quote, for
19 purposes of determining fair value."

20 That's who made the determination, the advisor and
21 Houlihan Lokey. It doesn't say anything about Highland.

22 "As reflected in the consultation, the advisor" —
23 meaning HCMFA — "ultimately determined that both March
24 transactions should be classified as orderly." So they're
25 changing it from nonorderly to orderly. "The fair" — and then

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1 it continues, quote: The fair valuation methodology adopted, as
2 addressed in the consultation, weights inputs and doesn't
3 reflect last-sales transaction pricing exclusively in
4 determining fair value. The orderly determination, – in other
5 words, the determination made by the advisor and adoption of the
6 fair-weighted – the weighted fair valuation methodology resulted
7 in NAV errors in the fund. And that's what's the fund, is the
8 NAV error.

9 So this is – this is contemporaneous, documentary,
10 undisputed evidence that the advisors told their client that it
11 made a mistake. There is not – they talk about the letter to
12 the SEC. They just say stuff. This is whack a mole. They
13 didn't present a single document to you, a single
14 contemporaneous document that says Highland made the mistake.
15 They tell the SEC, they tell their client, they tell their
16 insurance carrier that they made the mistake.

17 Undisputed facts.

18 I don't really have much more, Your Honor. I would
19 just ask the Court to seriously consider the evidence, to
20 seriously consider the legal standard, and to do justice in
21 preparing its report and recommendations. If Your Honor has no
22 questions, I've completed my presentation.

23 THE COURT: All right. Thank you.

24 Let me ask a couple of things. First, we don't have
25 anything else under advisement in Highland right now. I know we

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1 have closing arguments next week in the –

2 MR. MORRIS: I'm sorry. The question is whether the
3 Court has any other matters that are under advisement right now?

4 THE COURT: Yeah. I don't think we do. I mean we – I
5 mean we've done all our reports and recommendations that have
6 been on our –

7 MR. MORRIS: Yeah.

8 THE COURT: – list. And I've got closing arguments
9 next week one day, I forget which date, maybe Wednesday,
10 Wednesday of next week in the –

11 MR. MORRIS: It is Wednesday.

12 THE COURT: – in the big –

13 MR. MORRIS: Um-hum.

14 THE COURT: – in the big adversary.

15 So – so let me think through this. Are there any –
16 are there any looming deadlines, deadlines of any sort in these
17 note adversary proceedings? You know, obviously you're not –
18 you don't have a trial date out in the future in Judge Starr's
19 court, because I'll certify when it's trial ready if it needs to
20 go to trial. Anything, any deadlines?

21 MR. MORRIS: Nothing that I'm aware of, Your Honor. I
22 think that's exactly right, that we're here finishing summary
23 judgment, and I think the next thing to happen is for you to
24 enter the orders on the two motions that were argued earlier
25 today where Your Honor issued bench rulings and to get the

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1 report and recommendation on summary judgment to Judge Starr and
2 then we'll take it from there.

3 THE COURT: Okay. And -

4 MS. DEITSCH-PEREZ: And, Your Honor, were you asking
5 just about the note cases? I just -

6 THE COURT: Well, -

7 MS. DEITSCH-PEREZ: These note - the note cases that
8 are the subject of this motion or about all matters in
9 bankruptcy -

10 THE COURT: I was - I was thinking of all matters.
11 I'm just trying to think about -

12 MS. DEITSCH-PEREZ: There are -

13 THE COURT: - how quickly I'm going to get you - get a
14 report and recommendation out. And I just, number one, wanted
15 to know if I did have anything else in my queue ahead of this,
16 and the answer is I don't in all of the Highland matters.

17 But then the second thing I was getting at was
18 deadlines. For example, okay, if - let's say hypothetically I
19 were to deny motion for summary judgment, then you've got a
20 whole - you've got at that point a very complex set of adversary
21 proceedings, right, because you've got avoidance actions and all
22 kinds of alternative theories, plaintiff, that you would be
23 arguing, correct?

24 MR. MORRIS: I think -

25 MS. DEITSCH-PEREZ: Those are all -

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1 MR. MORRIS: - procedurally, Your Honor, right, you
2 don't - I think we all agree, you don't decide this motion. You
3 give a report and recommendation to the judge, to Judge Starr.
4 And Judge Starr - I'll be honest with you, I don't know if we
5 have an opportunity to object or not, but let's assume we do.

6 THE COURT: Well, -

7 MR. MORRIS: At some point Judge Starr will decide
8 whether or not to grant the motion -

9 THE COURT: No, -

10 MR. MORRIS: - and if - and if he denies the motion,
11 then we'll proceed to a jury trial on all claims.

12 THE COURT: That's what - I'm getting at the other
13 claims. You know, it -

14 MS. DEITSCH-PEREZ: The other - to other claims, Your
15 Honor, -

16 THE COURT: Let's - just a minute, just a minute, just
17 a minute.

18 I'm just thinking through this. If summary judgment
19 were to be denied on these Counts 1 and 2 by Judge Starr, and he
20 said, no, this needs to go to a jury, then there are a bunch of
21 other claims that basically -

22 MR. MORRIS: Correct.

23 THE COURT: - plaintiff - plaintiff fallback claims,
24 right? Avoidance actions and whatnot, right?

25 MR. MORRIS: And breach of -

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1 MS. DEITSCH-PEREZ: That's what —

2 MR. MORRIS: — fiduciary duty, that's correct, Your
3 Honor.

4 MS. DEITSCH-PEREZ: Except, Your Honor, —

5 THE COURT: Um-hum.

6 MS. DEITSCH-PEREZ: — and if I could please clarify
7 the record because Mr. Morris is incorrect that those are just
8 sitting there, those — the motion to dismiss those claims and
9 the motion to compel arbitration of those claims is currently
10 sitting before Judge Starr, and he — and the parties agreed
11 that those would be stayed until Your Honor had made the report
12 and recommendation, and Judge Starr had ruled upon it.

13 THE COURT: Okay.

14 MS. DEITSCH-PEREZ: So that's other claims are not
15 simply sitting in the bankruptcy court, if you want to think of
16 them as placed somewhere. They are currently up at the district
17 court.

18 THE COURT: No, I didn't think they were at the
19 bankruptcy court. I just couldn't remember —

20 MS. DEITSCH-PEREZ: Okay.

21 THE COURT: I guess what I'm getting at, you know,
22 have you all held up on doing discovery on those other claims,
23 waiting to get a ruling on Counts 1 or 2, or anything like that?

24 MR. MORRIS: I'll be honest with you, I don't remember
25 off the top of my head, Your Honor.

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1 THE COURT: Okay. All right.

2 MR. MORRIS: I don't think so. I don't think so.

3 THE COURT: All right.

4 MR. MORRIS: I don't think — I don't think for these
5 purposes — well, I'll just leave it at that. I don't know the
6 answer off the top of my head, and I don't want to commit myself
7 to something if I'm not certain.

8 THE COURT: Okay. All right. Well, don't read
9 anything into my questions. I'm just — I'm wanting to get a
10 report and recommendation to Judge Starr as soon as possible and
11 I was just kind of wanting to know what all hangs —

12 MR. MORRIS: Sure.

13 THE COURT: — in the balance if, you know, I were to
14 take a few weeks to get this out. It sets in motion maybe a
15 chain of events. Here's what I'm going to do, in a normal case
16 I would say these things with the hopes that maybe it might
17 encourage settlement. Forgive me for saying in a normal case.
18 This is not normal. There's been nothing about Highland that's
19 been normal. But I'm going to do — I'm going to say right now
20 what I would say in any other case.

21 I am likely to grant summary judgment here against all
22 the note defendants expect I'm not sure about HCMFA. I need to
23 drill down a little bit more on what the summary judgment
24 evidence is, but you know here's what I've got in front of me.
25 I've got, with the exception of HCMFA, I've got all the other

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1 defendants admitting to the debtor's prima facie case, okay.
2 But what I have is essentially a defense of an oral agreement.
3 Yes, I know that under Texas law oral agreements are sometimes
4 enforceable, but I think context matters. And in the context of
5 promissory notes where all of the essential elements have been
6 admitted to, there's a note on movant, sign the note. Movant's
7 the legal owner or holder of it, and a balance is due. When
8 you've got all of that, you know you better have something very,
9 very significant to create a fact issue for a jury. And here,
10 again, I've got an oral agreement that has morphed from Highland
11 agreed it wouldn't collect on the notes to Highland agreed it
12 wouldn't collect on the notes if certain condition subsequent
13 happened. It's morphed from it was an agreement that Dondero
14 made with himself to many months later it was presented as an
15 agreement between Mr. Dondero and his sister, who happened to
16 not be an officer or director or representative of any sort of
17 Highland or these note makers. And all of this against many
18 months of Rule 26 disclosures that never mentioned Ms. Dondero
19 as a potential fact witness. So we have four out of the five
20 defendants eventually adopting this argument.

21 So again I, as I probably hinted at during oral
22 arguments, I see there being a nuance here between saying it's a
23 credibility issue for a jury. Credibility of the witness, a
24 jury is entitled to look at credibility questions. There's a
25 nuance between that and a situation of defenses are put out that

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1 create fact issues, but the fact issues just don't seem genuine.
2 And, you know, as we've said, no reasonable – genuine means no –
3 if it's not genuine, that means no reasonable jury could adopt
4 the argument. So I'm very disturbed at both the fact that we've
5 had a morphing defense. And I know, I know it happens in
6 litigation as discovery is undertaken, but that's not what we've
7 had here.

8 And I'm very disturbed that we have had disclosure
9 after disclosure after disclosure after disclosure where these
10 notes were disclosed and nothing was said about, well, there's a
11 significant contingency so that they might not be collectable.
12 We went through those all today: The audited financial
13 statements; the schedules in the bankruptcy; the MORs in the
14 bankruptcy; a disclosure statement; a plan that very
15 significantly had as a feature attempts to collect on these
16 notes; objections by some of the note defendants to the
17 feasibility of the plan without mentioning, oh, but the notes
18 aren't going to be collectable.

19 I have to find – Mr. Morris, you mentioned somewhere
20 in the record that there was a disclosure that the Hunter
21 Mountain note was uncollectible. I've never followed exactly
22 where that was. But I just don't understand, frankly, what's
23 going on here. I mean these seem like very dangerous defenses
24 that have been forged here.

25 I guess no one's worried about materially misleading

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1 audited financial statements. I don't know who saw these
2 financial statements. You know maybe they think that there's no
3 one who could complain about materially misleading financial
4 statements. Maybe they aren't worried about documents signed
5 under penalty of perjury in the bankruptcy case, having been
6 erroneous or materially misleading. But, anyway, I'm kind of
7 doing a soliloquy up here, I guess, but again, you know, in a
8 normal case I would be telling people this is how I'm inclined
9 to rule and people would either settle or not, motivated by what
10 might be coming down the pike.

11 I promise you I will give a very thorough report and
12 recommendation to Judge Starr so that he will understand the
13 basis for my ruling and he will either accept it or reject it.

14 And, again, I've told you with HCMFA, you know, we
15 sort have a unique situation out there with this compensation
16 argument, we may have some genuine issues of disputed facts on
17 that one, but I'm not sure. I'm just letting you know that's
18 the one that I find most perplexing.

19 All right. Is there anything further before we call
20 it quits today?

21 (The recording ends at 5:00 o'clock p.m.)

22 -o0o-

State of California)
County of Stanislaus) SS.

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Dated April 29, 2022



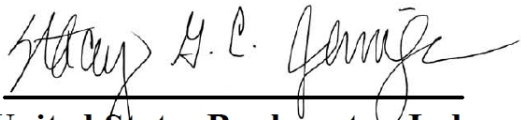
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 19, 2022


United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Case No. 19-34054-sgj11 Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	Adversary No. 21-03004-sgj Civ. Act. No. 3:21-cv-00881
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03005-sgj Civ. Act. No. 3:21-cv-00880 <u>(Consolidated Under Civ. Act. No. 3:21-cv-00881)</u>
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff.	

v. JAMES D. DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No. 21-03003-sgj Civ. Act. No. 3:21-cv-01010 <u>(Consolidated Under Civ. Act. No. 3:21-cv-00881)</u>
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03006-sgj Civ. Act. No. 3:21-cv-01378 <u>(Consolidated Under Civ. Act. No. 3:21-cv-00881)</u>
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03007-sgj Civ. Act. No. 3:21-cv-01379 <u>(Consolidated Under Civ. Act. No. 3:21-cv-00881)</u>

**REPORT AND RECOMMENDATION TO DISTRICT COURT: COURT SHOULD
GRANT PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST
ALL FIVE NOTE MAKER DEFENDANTS¹ (WITH RESPECT TO ALL SIXTEEN
PROMISSORY NOTES) IN THE ABOVE-REFERENCED CONSOLIDATED NOTE
ACTIONS**

I. Introduction

The five above-referenced civil actions, emanating from the Chapter 11 bankruptcy case of Highland Capital Management, L.P. (“Highland,” “Plaintiff,” or, sometimes, the “Debtor”²)

¹ The “Note Maker Defendants”—sometimes collectively referred to simply as the “Defendants”—are: James D. Dondero (Civ. Action No. 3:21-cv-01010); Highland Capital Management Fund Advisors, L.P. (Civ. Action No. 3:21-cv-00881); NexPoint Advisors, L.P. (Civ. Action No. 3:21-cv-00880); Highland Capital Management Services, Inc (Civ. Action No. 3:21-cv-01378); and HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC (Civ. Action No. 3:21-cv-01379).

² Highland is actually now a “Reorganized Debtor,” having obtained confirmation of a Chapter 11 plan, which went “effective” in August 2021.

started out as what seemed like very simple lawsuits by a Chapter 11 debtor to collect on large promissory notes owed to it (collectively, the “Note Actions”). The Note Actions were initially filed in the bankruptcy court as adversary proceedings.

The Defendants soon filed motions to withdraw the reference in these Note Actions, arguing that the causes of action asserted against them are statutory non-core claims and the bankruptcy court also does not have constitutional authority to enter final judgments. The bankruptcy court agreed that the litigation presents non-core, related-to matters—since there are no proofs of claims of the Note Maker Defendants still pending, the resolution of which might be intertwined with the underlying promissory notes.³ Additionally, the Note Maker Defendants did not consent to final judgments being issued by the bankruptcy court, and they also demanded jury trials.⁴ The District Court accepted a report and recommendation of the bankruptcy court that the reference should be withdrawn when these Note Actions are trial-ready, with the bankruptcy court acting essentially as a magistrate judge for the District Court prior to trial, presiding over all pretrial matters. The Plaintiff’s motion for partial summary judgment, now pending, is the type of pretrial matter contemplated to be handled by the bankruptcy court (with submission to the District Court of a Report and Recommendation required—to the extent final disposition of any claim is proposed).

By way of further background, the five Note Actions were originally brought on January 22, 2021, by Plaintiff (before confirmation of its Chapter 11 plan), again, as simple suits on promissory notes—that is, alleging breach of contract (nonpayment of notes) and seeking turnover of amounts allegedly due and owing from the various Defendants. Each of the Note Maker

³ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁴ 28 U.S.C. § 157(c) & (e).

Defendants are closely related to Highland's founder and former president, James Dondero ("Mr. Dondero"), and collectively borrowed tens of millions of dollars from Highland prepetition. The indebtedness was memorialized in a series of demand and term notes (i.e., sixteen notes altogether: thirteen demand notes and three term notes). The indebtedness represented by these notes remains unpaid.

The five Note Actions were subsequently consolidated into one action before District Judge Brantley Starr, in the interest of judicial economy, under Civ. Action No. 3:21-cv-881, since there are overlapping facts and defenses.⁵ As alluded to above, the consolidated litigation involves sixteen different promissory notes on which Highland is the payee. More than \$60 million of unpaid principal and interest was alleged to be due and owing on the notes as of the time that the five Note Actions were filed. The Note Maker Defendants and their notes are as follows: (i) Mr. Dondero is maker on three demand notes; (ii) Highland Capital Management Fund Advisors, L.P. ("HCMFA") is maker on two demand notes; (iii) NexPoint Advisors, L.P. ("NexPoint") is maker on one term note; (iv) Highland Capital Management Services, Inc ("HCMS") is maker on five notes (four demand notes and one term note); and (v) HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC ("HCRE") is maker on five notes (four demand notes and one term note). Highland filed the five Note Actions—one against each of the Note Maker Defendants—to pursue payment on the notes to help fund distributions to creditors under its Chapter 11 plan. Mr. Dondero,

⁵ The typical procedure in consolidation actions is to consolidate under the lowest-numbered case, which here would have been Civ. Action No. 3:21-cv-880, previously assigned to Judge Sam Cummings. However, Judge Starr determined that judicial efficiency would be best served by consolidating under Civ. Action No. 3:21-cv-881, because Civ. Action Nos. 3:21-cv-880 and 3:21-cv-881 were actually filed in district court on the same day and due to certain other factors explained in Judge Starr's Order Granting Defendant's Motion to Consolidate the Note Cases, dated January 6, 2022.

while a maker on three of the sixteen notes, was the signatory on a total of twelve of the sixteen notes.

The Note Actions morphed, so to speak, when *four* of the five Note Maker Defendants defended the Note Actions by alleging that an *oral agreement* existed between Highland and each of them—the substance of which was allegedly that Highland would not pursue collection on their underlying notes if certain conditions subsequent occurred.⁶

The “Oral Agreement” Defense Asserted by Four of the Five Note Defendants. To be clear, the “oral agreement” defense was asserted by each of the Note Maker Defendants *except* HCMFA. The four Defendants who assert the oral agreement defense are sometimes collectively referred to by the Plaintiff as the *“Alleged Agreement Defendants”* and they are: Mr. Dondero; NexPoint; HCMS; and HCRE. To be further clear, these Alleged Agreement Defendants represent that:

Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero’s control. The purpose of this agreement was to provide compensation to Defendant James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at [Highland] and in the industry. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant James Dondero believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this [Action].

Paragraph 82 in Amended Answer of Mr. Dondero [DE # 83 & DE # 16 ¶ 40 in Adv. Proc. No. 21-3003]. *See also* Paragraph 42 in Amended Answer of NexPoint [DE # 50 & DE # 64 ¶ 83 in

⁶ These Note Maker Defendants also pleaded the affirmative defenses of justification and/or repudiation; estoppel; waiver; and ambiguity.

Adv. Proc. No. 21-3005]; Paragraph 56 in Amended Answer of HCMS [DE #34 & DE # 73 ¶ 97 in Adv. Proc. No. 21-3006]; Paragraph 58 in Amended Answer of HCRE [DE # 34 & DE # 68 ¶ 99 in Adv. Proc. No. 21-3007].

Somewhat shockingly for a multi-billion-dollar enterprise with sophisticated officers and directors—which was audited by one of the largest and most iconic public accounting firms in the world (PwC)—the alleged “oral agreement” was supposedly made (unbeknownst to any of those officer, directors, and PwC) between: (a) Mr. Dondero, acting on behalf of each of the Alleged Agreement Defendants; and (b) *his sister, Nancy Dondero*, of Vero Beach, Florida (“Sister Dondero”), acting on behalf of Highland. Notably, Sister Dondero was never an officer, manager, or held any role with Highland, but the position of the Alleged Agreement Defendants is that she nevertheless had authority to act for Highland, in connection with agreeing not to collect on the Notes, because she was/is the trustee of the Dugaboy Investment Trust (“Dugaboy”), which is a family trust of Mr. Dondero, of which Mr. Dondero is sole beneficiary during his lifetime (with his children as the future beneficiaries).⁷ Here is the catch: Dugaboy happens to own a majority of the *limited partnership interests of Highland*—which, according to the Alleged Agreement Defendants, means Dugaboy can exert control over Highland and do things like release millions of dollars’ worth of debt owed to Highland.⁸

When this “oral agreement” defense was articulated, the bankruptcy court granted Highland’s request for leave to amend its original complaints in each of the four applicable Note

⁷ Mr. Dondero was himself the trustee of Dugaboy until his resignation as such on August 26, 2015. James Dondero Dec., DE # 155, ¶ 21 in Adv. Proc. No. 21-3003.

⁸ *See id.* ¶ 20 (more specifically, the Defendants make a bizarre argument that a majority of equity holders in Highland could approve “compensation” set for Highland’s general partner, Strand Advisors, Inc. (“Strand”) and Strand’s affiliates; the further argument is that Mr. Dondero is an affiliate of Strand, and, thus, Sister Dondero could release obligations on the Notes as a form of “compensation” to Mr. Dondero).

Actions to allege alternative theories of liability and add Mr. Dondero,⁹ Dugaboy, and Sister Dondero as additional defendants on new counts—the theories being that, if such an “oral agreement” was made, it may have given rise to other causes of action on the part of the actors involved. Highland amended its complaints in each of the four applicable Note Actions, adding new Counts III, IV, V, VI, and VII alleging, among other things, fraudulent transfers (Counts III and IV), declaratory judgment as to certain provisions of Highland’s limited partnership agreement (Count V), breach of fiduciary duty (Count VI), and aiding and abetting breach of fiduciary duty (Count VII) (the “Amended Complaints”).

The “Mutual Mistake” Defense of one sole Defendant: HCMFA. Another way in which the simple Note Actions morphed was with regard to the “mutual mistake” defense that was alleged only with regard to the *two notes on which Defendant HCMFA was the maker*.

The “mutual mistake” defense was articulated as follows. First, the signature on the two notes on which HCMFA was the maker—that of Frank Waterhouse, who was the Treasurer of HCMFA and also the former Chief Financial Officer (“CFO”) of Highland until February 2021 (when he went to work for entities now controlled by Mr. Dondero)—was allegedly not authorized. More pointedly, it was alleged that the creation of the notes was entirely a *mistake* because (a) even though funds were frequently transferred between Highland and affiliates such as HCMFA, and (b) even though the Debtor’s in-house accountants usually papered these transfers as loans, and (c) even though \$7.4 million was undisputedly transferred from Highland to HCMFA at the time of the preparation and execution of the HCMFA Notes, the transfers of \$7.4 million of funds to HCMFA was allegedly not supposed to be treated as a loan or loans in this instance. The fund

⁹ Mr. Dondero was, of course, already a Defendant in Adv. Proc. No. 21-3003, as he was a maker on three notes.

transfer was allegedly supposed to be treated as **compensation** to HCMFA from Highland, for certain harm Highland allegedly caused to HCMFA and its stakeholders through an error or negligence committed by Highland or its professionals. The HCMFA notes were allegedly not what **Mr. Dondero**—the person in charge of both Highland and HCMFA¹⁰—intended, and no one consulted with him before creating the HCMFA Notes. See Paragraph 29, DE # 127, in Adv. Proc. No. 21-3004.

Manufacturing Chaos. In the Plaintiff’s motion for partial summary judgment now pending before the court—again, filed as to all five Note Maker Defendants and as to all sixteen notes—the Plaintiff contends that these are simple suits on promissory notes, and the Note Maker Defendants are essentially trying to manufacture chaos by attempting to create fact issues with bizarre (if not preposterous) defenses. The Plaintiff asserts that it is entitled to judgment as a matter of law on Counts I (breach of contract for nonpayment) and II (turnover of funds, pursuant to Bankruptcy Code Section 542(b)) in each of the five Note Actions.

The bankruptcy court agrees. The summary judgment evidence shows that the sixteen Notes: (i) are valid, (ii) were executed by the Note Maker Defendants and in favor of Highland; and (iii) there is a balance due and owing under each of the sixteen Notes. The Note Maker Defendants failed to rebut Plaintiff’s prima facie case because the Note Maker Defendants failed to create a **genuine** issue of material fact regarding their breaches. There was an absence of evidence to support each of Note Maker Defendants’ affirmative defenses. Interestingly, among other things, Mr. Dondero has referred to all of the Notes at issue here as “soft notes” that were “made between friendly affiliates,” implying that this somehow makes them less collectible.¹¹ For

¹⁰ See James Dondero Dec. DE # 155, ¶¶ 3-4, in Adv. Proc. No. 21-3003.

¹¹ *Id.* ¶¶ 5-18.

the avoidance of doubt, a “soft note” is not a thing—not under the Bankruptcy Code, not in the world of commercial finance, and not as described in any evidence submitted to the court.¹² The bankruptcy court hereby recommends that the District Court grant summary judgment in favor of the Plaintiff/Reorganized Debtor on Counts I and II in all five consolidated Note Actions, for the reasons set forth below.

II. Undisputed Facts Regarding Each of the Thirteen Demand Notes

Of the sixteen notes at issue in the Notes Actions (sometimes collectively referred to as the “Notes”): (a) thirteen were demand notes; and (b) three were term notes. These notes were executed between 2013 and 2019 and are described below. These are the undisputed facts pertaining to the thirteen demand notes.

A. The Three Demand Notes on Which Mr. Dondero is Maker

On February 2, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of \$3,825,000 (“Dondero’s First Note”). Klos Dec. ¶ 18, Ex. D;¹³ Pl. Ex. 125 at p. 9, Appx. 2357; Pl. Ex. 188, Appx. 3001-3002; Pl. Ex. 189, Appx. 3003-

¹² For the sake of clarity, this court can take judicial notice that there are plenty of complex chapter 11 cases where there are intercompany loans among debtor-affiliates, and the intercompany loans are cancelled as part of a plan. However, this happens in *very different circumstances from the Highland case*—i.e., when all affiliates file bankruptcy, and either a secured lender has liens on all the assets of all the affiliates and/or there is no benefit to the general creditor body of collecting on the intercompany loans.

¹³ This refers to the Declaration of David Klos—the current Chief Financial Officer (“CFO”) of the Reorganized Debtor—and the Exhibits attached thereto, filed concurrently with Highland’s Motion for Partial Summary Judgment, found at DE # 133 in Adv. Proc No. 21-3003. For convenience, the court will occasionally refer to the “Klos Declaration” at this same DE # 133 in Adv. Proc No. 21-3003 even when referring herein to the *other* Note Actions (i.e., the Note Actions involving the other Note Maker Defendants) since the very same Declaration was filed in each of the Note Actions.

3004; Pl. Ex. 74, Appx. 1338-1340; Pl. Ex. 81 (Responses to RFAs 1-3), Appx. 1387; *see also* Pl. Ex. 32 ¶ 20, Appx. 664; Pl. Ex. 31 ¶ 20, Appx. 647.¹⁴

On August 1, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Second Note”). Klos Dec. ¶ 19, Ex. E; Pl. Ex. 126 at p. 2, Appx. 2366; Pl. Ex. 190, Appx. 3005-3006; Pl. Ex. 76, Appx. 1354-1356; Pl. Ex. 81 (Responses to RFAs 5-7), Appx. 1387-1388; *see also* Pl. Ex. 32 ¶ 21, Appx. 664; Pl. Ex. 31 ¶ 21, Appx. 647.

On August 13, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Third Note” and collectively, with Dondero’s First Note and Dondero’s Second Note, the “Dondero Notes”). Klos Dec. ¶ 20, Ex. F; Pl. Ex. 126 at p. 2, Appx. 2366; Pl. Ex. 77, Appx. 1357-1359; Pl. Ex. 81 (Responses to RFAs 9-11), Appx. 1388; *see also* Pl. Ex. 32 ¶ 22, Appx. 664; Pl. Ex. 31 ¶ 22, Appx. 647.

B. The Two Demand Notes on Which HCMFA is Maker

On May 2, 2019, HCMFA executed¹⁵ a promissory note in favor of Highland, as payee, in the original principal amount of \$2,400,000 (“HCMFA’s First Note”). Klos Dec. ¶ 21, Ex. G; Pl. Ex. 147 at p. 7, Appx. 2526; Pl. Ex. 54, Appx. 870-873; Pl. Ex. 55, Appx. 874-875; Pl. Ex. 1 at Ex. 1, Appx. 9-11; Pl. Ex. 53, Appx. 866-869.

¹⁴ Concurrently with filing its Motions for Partial Summary Judgment, Highland filed an Appendix of Exhibits in Support (the “Appendix”) at DE #135 in Adv. Proc No. 21-3003. Citations to the Appendix are notated as follows: Pl. Ex. #, Appx. #. For convenience, the court will occasionally refer to this Appendix at this same DE # 135 in Adv. Proc No. 21-3003 even when referring herein to the *other* Note Actions (i.e., the Note Actions involving the other Note Maker Defendants) since the very same Appendix was filed in each of the Note Actions.

¹⁵ HCMFA disputes that the signature of HCMFA’s Treasurer, Frank Waterhouse, on this document was genuine or authorized. This allegation will be addressed later herein.

On May 3, 2019, HCMFA executed¹⁶ a promissory note in favor of Highland, as payee, in the original principal amount of \$5,000,000 (“HCMFA’s Second Note,” and together with HCMFA’s First Note, the “HCMFA Notes”). Klos Dec. ¶ 22, Ex. H; Pl. Ex. 147 at p. 7, Appx. 2526; Pl. Ex. 56, Appx. 876-877; Pl. Ex. 1 at Ex. 2, Appx. 12-15; Pl. Ex. 57, Appx. 878-880.

C. Four Demand Notes on Which Highland Capital Management Services, Inc. (“HCMS”) is Maker

On March 28, 2018, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of \$150,000 (“HCMS’s First Demand Note”). Klos Dec. ¶ 23, Ex. I; Pl. Ex. 143, Appx. 2487-2490; Pl. Ex. 3 at Ex. 1, Appx. 117-119.

On June 25, 2018, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of \$200,000 (“HCMS’s Second Demand Note”). Klos Dec. ¶ 24, Ex. J; Pl. Ex. 144, Appx. 2491-2494; Pl. Ex. 3 at Ex. 2, Appx. 120-122.

On May 29, 2019, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of \$400,000 (“HCMS’s Third Demand Note”). Klos Dec. ¶ 25, Ex. K; Pl. Ex. 145 at p. 11, Appx. 2506; Pl. Ex. 3 at Ex. 3, Appx. 123-125.

On June 26, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$150,000 (“HCMS’s Fourth Demand Note,” and collectively, with HCMS’s First Demand Note, HCMS’s Second Demand Note, and HCMS’s Third Demand Note, the “HCMS Demand Notes”). Klos Dec. ¶ 26, Ex. L; Pl. Ex. 146 at p. 7, Appx. 2516; Pl. Ex. 3 at Ex. 4, Appx. 126-128.

¹⁶ HCMFA disputes that the signature of HCMFA’s Treasurer on this document was genuine or authorized. This allegation will be addressed later herein.

D. Four Demand Notes on Which HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) ("HCRE") is Maker

On November 27, 2013, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of \$100,000 ("HCRE's First Demand Note"). Klos Dec. ¶ 27, Ex. M; Pl. Ex. 148, Appx. 2533-2536; Pl. Ex. 4 at Ex. 1, Appx. 201-203.

On October 12, 2017, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of \$2,500,000 ("HCRE's Second Demand Note"). Klos Dec. ¶ 28, Ex. N; Pl. Ex. 154 at p. 7, Appx. 2575; Pl. Ex. 4 at Ex. 2, Appx. 204-206.

On October 15, 2018, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of \$750,000 ("HCRE's Third Demand Note"). Klos Dec. ¶ 29, Ex. O; Pl. Ex. 155 at p. 5, Appx. 2585; Pl. Ex. 4 at Ex. 3, Appx. 207-209.

On September 25, 2019, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of \$900,000 ("HCRE's Fourth Demand Note," and collectively, with HCRE's First Demand Note, HCRE's Second Demand Note, and HCRE's Third Demand Note, the "HCRE Demand Notes"). Klos Dec. ¶ 30, Ex. P; Pl. Ex. 156 at p. 6, Appx. 2596; Pl. Ex. 4 at Ex. 4, Appx. 210-212.

E. The Identical Provisions in Each of the Demand Notes.

Except for the date, the amount, the maker, and the interest rate, each of the thirteen Demand Notes listed above is identical and includes the following provisions:

2. **Payment of Principal and Interest.** The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

5. **Acceleration Upon Default.** Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of

this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

6. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

7. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

See Pl. Ex. 74, Appx. 1338-1340; Pl. Ex. 76, Appx. 1354-1356; Pl. Ex. 77, Appx. 1357-1359; Pl. Ex. 1 at Exs. 1-2, Appx. 9-15; Pl. Ex. 3 at Exs. 1-4, Appx. 117-128; and Pl. Ex. 4 at Exs. 1-4, Appx. 201-212.

F. Demands by Plaintiff and Non-Payment.

The undisputed evidence is that on December 3, 2020, during its bankruptcy case—with its Chapter 11 plan coming up for confirmation and its need of funding to pay its millions of dollars' of debt owed to creditors—Highland made separate demands on Mr. Dondero, HCMFA, HCMS, and HCRE, respectively, for payment of all accrued principal and interest due under the Demand Notes by December 11, 2020. The demand letters also included a demand for all costs of collection, including attorneys' fees, as provided in the above-referenced Demand Notes. Pl. Ex. 79, Appx. 1370-1373; Pl. Ex. 1 at Ex. 3, Appx. 16-19; Pl. Ex. 3 at Ex. 5, Appx. 129-132; and Pl. Ex. 4 at Ex. 5, Appx. 213-216 (collectively, the "Demand Letters").

Furthermore, it is undisputed that none of these Note Maker Defendants made any payments on the Demand Notes or otherwise replied to the Demand letters before Plaintiff

commenced these Note Actions. Therefore, the Note Maker Defendants have breached Section 2 of the Demand Notes by their terms and are in default.

With regard to the three Dondero Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under their terms was \$9,263,365.05. Klos Dec. ¶ 37.

With regard to the two HCMFA Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under their terms was \$7,874,436.09. Klos Dec. ¶ 40.

With regard to the four HCMS Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under the HCMS Demand Notes was \$972,762.81. Klos Dec. ¶ 45.

With regard to the four HCRE Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under the HCRE Demand Notes was \$5,330,378.23. Klos Dec. ¶ 50.

III. Undisputed Facts Regarding Each of the Three Term Notes

Of the sixteen notes at issue in the Notes Actions, three were term notes (the “Term Notes”). These are the undisputed facts pertaining to the three Term Notes.

A. The Three Term Notes

The Term Notes were each executed by Mr. Dondero on May 31, 2017. They were each for 30-year terms. One was for NexPoint, one was for HCMS, and one was for HCRE. Klos Dec.

¶¶ 27-29. Each of these three Term Notes rolled up obligations of the makers under prior notes.¹⁷

Each Term Note is more fully described as follows:

A Term Note signed on NexPoint's behalf in the original principal amount of \$30,746,812.23 (the "NexPoint Term Note"). Klos Dec. ¶ 31, Ex. A; Pl. Ex. 2 at Ex. 1, Appx. 41-44; Pl. Ex. 2 ¶ 21, Appx. 28; Pl. Ex. 15 ¶ 21, Appx. 428.

A Term Note signed on HCMS's behalf in the original principal amount of \$20,247,628.02 (the "HCMS Term Note" and together with the HCMS Demand Notes, the "HCMS Notes"). Klos Dec. ¶ 32, Ex. R; Pl. Ex. 3 at Ex. 6, Appx. 133-136.

A Term Note signed on HCRE's behalf in the original principal amount of \$6,059,831.51 (the "HCRE Term Note" and together with the HCRE Demand Notes, the "HCRE Notes"). Klos Dec. ¶ 33, Ex. S; Pl. Ex. 4 at Ex. 6, Appx. 217-220.

According to Frank Waterhouse,¹⁸ the former Highland CFO (who was also an officer of each of these three Note Maker Defendants), Highland loaned the money to NexPoint, HCMS, and HCRE to enable those entities to make investments. Pl. Ex. 105 at 126:21-129:3, Appx. 2081. Mr. Dondero claimed to have no personal knowledge of the purpose of the loans or the borrowers' use of the loan proceeds. Pl. Ex. 98 at 420:10-18, Appx. 1776, 435:17-25, Appx. 1779, 448:4-13, Appx. 1783, and 450:3-24, Appx. 1783.

B. The Identical Provisions in Each of the Term Notes.

¹⁷ Proof of the loans underlying the prior notes (as defined in each of the Term Notes) is found at Pl. Exs. 127-141, Appx. 2368-2481 (HCMS); Pl. Exs. 149-153, Appx. 2537-2567 (HCRE); Pl. Exs. 157-161, Appx. 2599-2636 (NexPoint (the July 22, 2015 prior note appears to have been backdated because the underlying loans were effectuated between July 2015 and May 2017 (see Pl. Ex. 161))).

¹⁸ Frank Waterhouse was CFO of Highland until he left Highland in February 2021. He now works for entities controlled by Mr. Dondero.

Except for the date, the amount, the maker, the interest rate, and the identity of the Prior Notes (as that term is defined in each Term Notes), each of the Term Notes is identical and includes the following provisions:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the “Annual Installment”) until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

C. Non-Payment/Defaults Under the Term Notes.

NexPoint, HCMS, and HCRE each failed to timely make their Annual Installment payments that were due on December 31, 2020. Belatedly, NexPoint made a payment of \$1,406,111.92, on January 14, 2021, which reduced the total principal and interest then-outstanding. Also, belatedly, HCMS made a payment of \$181,226.83, on January 21, 2021, which reduced the total principal and interest then-outstanding. Finally, belatedly HCRE made a payment

of \$665,811.09, on January 21, 2021, which reduced the total principal and interest then-outstanding. However, as set forth in Section 4 above, the Term Notes allowed Highland to declare a default without notice when the annual installments were not timely paid on December 31, 2020.

As of December 17, 2021, the unpaid principal and accrued interest due under the NexPoint Term Note was \$24,383,877.27.12. Klos Dec. ¶ 51.

As of December 17, 2021, the unpaid principal and accrued interest due under the HCMS Term Note was \$6,748,456.31.13. Klos Dec. ¶ 52.

As of December 17, 2021, the unpaid principal and accrued interest due under the HCRE Term Loan was \$5,899,962.22.14. Klos Dec. ¶ 53.

IV. Undisputed Corroborating Evidence Regarding the Sixteen Notes

A. The Notes Were All Disclosed on Highland's Financial Statements Audited by the Outside Accounting Firm PwC

The undisputed evidence establishes that (a) all of the Notes were provided to the accounting firm PwC, Highland's long-time outside auditors, and were described in Highland's audited financial statements; (b) all of the Notes were carried as assets on Highland's balance sheet and were valued in amounts equal to the accrued and unpaid principal and interest without any offset or reservation whatsoever;¹⁹ and (c) neither Highland nor Mr. Dondero disclosed any potential defenses to PwC, despite having an affirmative obligation to do so under generally accepted accounting principles ("GAAP").

¹⁹ As discussed below, the HCMFA Notes were executed in May 2019, and were fully described in the "Subsequent Events" section of Highland's audited financial statements for the period ending December 31, 2018. Pl. Ex. 34 at p. 39, Appx. 782. Because the HCMFA Notes were executed after the end of the fiscal year, they were not included as "assets" for 2018, and Highland never completed its 2019 audit. Nevertheless, the undisputed evidence also shows that HCMFA (a) disclosed the existence of the HCMFA Notes in the "Subsequent Events" section of its own 2018 audited financial statements, and (b) carried the HCMFA Notes as liabilities on its own balance sheet. Pl. Ex. 45 at p. 17; Pl. Ex. 192 at 54:6-9, 54:22-55:8, 55:23-56:3, Appx. 3028, 56:20-59:3, Appx. 3028-3029.

As part of the PwC audit process²⁰ (as is typical), Highland was the one who actually drafted the financial statements and accompanying notes, and management provided the information that PwC needed to conduct its audits. Pl. Ex. 94 at 14:8-15:14, Appx. 1556; *see also id.* at 49:11-50:22, Appx. 1564-1565. All of Highland's employees who worked on the audit reported to Mr. Waterhouse (Highland's CFO), and Mr. Waterhouse was ultimately responsible for making sure the audit was accurate before it was finalized. Pl. Ex. 105 at 87:25-89:10, Appx. 2071. As further part of the audit, PwC required Highland to deliver "management representation letters" that included specific representations that PwC relied upon. Pl. Ex. 94 at 16:18-17:20, Appx. 1556, 23:4-9, Appx. 1558. *See also* Pl. Ex. 105 at 96:24-98:6, Appx. 2073-2074 (according to Mr. Waterhouse, management representation letters are "required in an audit to help verify completeness."). For fiscal years 2017 and 2018, Mr. Dondero and Mr. Waterhouse signed Highland's management representation letters; their representations were applicable through the date of the audit's completion so that all "material" subsequent events could be included and disclosed. Pl. Ex. 33, Appx. 729-740, Pl. Ex. 86, Appx. 1420-1431, Pl. Ex. 94 at 17:21-25, Appx. 1556, 19:2-22:6, Appx. 1557-1558; *see also* Pl. Ex. 105 at 92:4-8, Appx. 2072, 94:20-95:12, Appx. 2073.

Mr. Dondero and Mr. Waterhouse made the following representations to PwC, on June 3, 2019, in connection with PwC's audit of Highland financial statements for the period ending December 31, 2018:

The Affiliated Party Notes²¹ represented bona fide claims against the makers, and all Affiliated Party Notes were current as of June 3, 2019. Pl. Ex. 33 ¶ 11, Appx. 732; Pl. Ex. 94 at 24:6-25:5, Appx. 1558.

²⁰ Pl. Ex. 94 at 9:24-12:14, Appx. 1554-1555.

²¹ "Affiliated Party Notes" is the term used by PwC to refer to any and all notes payable to Highland and made by officers, employees, or affiliates of Highland. *See generally* Pl. Ex. 33, Appx. 729-740; Pl. Ex. 94, Appx. 1551-1585.

If there were any errors in Highland's financial statements, they were not "material." Pl. Ex. 33 ¶ 32, Appx. 735; Pl. Ex. 94 at 25:6-26:13, Appx. 1558-1559.

There were no "material" transactions or agreements that were not recorded in the financial statements. Pl. Ex. 33 ¶ 34, Appx. 735; Pl. Ex. 94 at 26:14-27:11, Appx. 1559.

All relationships and transactions with, and amounts receivable or payable to or from, related parties were properly reported and disclosed in the consolidated financial statements. Pl. Ex. 33 ¶ 35(d), Appx. 735; Pl. Ex. 94 at 27:12-28:11, Appx. 1559.

All related party relationships and transactions known to Mr. Dondero and Mr. Waterhouse were disclosed. Pl. Ex. 33 ¶ 36, Appx. 736; Pl. Ex. 94 at 28:12-29:5, Appx. 1559.

All subsequent events were disclosed. Pl. Ex. 33 (signature page), Appx. 738; Pl. Ex. 94 at 29:6-30:2, Appx. 1559-1560.

Under GAAP, Highland was required to disclose to PwC: (a) all "material" related party transactions; and (b) any circumstances that would call into question the collectability of any of the Notes. Pl. Ex. 94 at 34:17-35:2, Appx. 1561, 51:17-52:5, Appx. 1565, 70:20-71:3, Appx. 1570. For purposes of the 2017 audit, the "materiality" threshold was \$2 million. Pl. Ex. 86 at p. 1, Appx. 1421. For purposes of the 2018 audit, the "materiality" threshold was \$1.7 million. Pl. Ex. 33 at p. 1, Appx. 730; Pl. Ex. 94 at p. 22:11-23:3, Appx. 1558. *See also* Pl. Ex. 105 at 91:14-93:6, Appx. 2072.

There is no evidence that Mr. Dondero nor anyone at Highland disclosed to PwC the existence of any defenses to the Notes (such as an "oral agreement or "mutual mistake"). Pl. Ex. 24 (Responses to RFAs 1-2), Appx. 521; Pl. Ex. 94 at 67:16-70:19, Appx. 1569-1570, 71:4-74-8, Appx. 1570-1571, 92:19-93:12, Appx. 1575; Pl. Ex. 105 at 102:2-5, Appx. 2075.

The Notes were carried on Highland's balance sheets as "Notes and other amounts due from affiliates." Pl. Ex. 34 at p. 2, Appx. 745; Pl. Ex. 72 at p. 2, Appx. 1291; Pl. Ex. 94 at 23:10-22, Appx. 1558, 31:11-33:20, Appx. 1560; Pl. Ex. 105 at 106:20-109:12, Appx. 2076.

The notes to the financial statements described the “Affiliate Notes” that were carried on Highland’s balance sheet; management calculated the amounts due and owing to Highland from each Affiliate. Pl. Ex. 72 at p. 30-31; Pl. Ex. 34 at p. 28-29; Pl. Ex. 94 at 34:17-36:25; 51:17-53:12, Appx. 1565; Pl. Ex. 105 at 110:22-112:21, Appx. 2077. The “fair value” of the Affiliate Notes was “equal to the principal and interest due under the notes.” Pl. Ex. 72 at p. 30-31, Appx. 1319-1320; Pl. Ex. 34 at p. 28-29, Appx. 771-772; Pl. Ex. 94 at 37:11-39:12, Appx. 1561-1562; 53:19-25, Appx. 1565. No discounts were given to the Notes, and PwC concluded that the obligors under each of the Affiliate Notes had the ability to pay all amounts outstanding. Pl. Ex. 92, Appx. 1514-1530; Pl. Ex. 93, Appx. 1531-1550; Pl. Ex. 94 at 41:2-45:6, Appx. 1562-1563, 55:17-60:22, Appx. 1566-1567, 68:20-25, Appx. 1569.

Finally, with regard to the two HCMFA Notes in particular (i.e., the ones allegedly subject to a “mutual mistake” defense—as further described below), a note to Highland’s audited financial statements for year 2018 disclosed, as a “subsequent event” (i.e., an event occurring after the December 31, 2018 end of the fiscal year and on or before June 3, 2019, the date Mr. Dondero and Mr. Waterhouse signed the management representation letters and PwC completed its audit), the following: “Over the course of 2019, through the report date, HCMFA issued promissory notes to [Highland] in the aggregate amount of \$7.4 million. The notes accrue interest at a rate of 2.39%.” Pl. Ex. 34 at p. 39, Appx. 782. *See also* Pl. Ex. 94 at 54:9-55:7, Appx. 1566.

B. More Corroborating Evidence: During the Highland Bankruptcy Case (In Fact, Shortly Before the Note Actions Were Filed) HCMFA and NexPoint Informed Their Retail Board of their Obligations Under their Respective Notes

HCMFA and NexPoint are engaged in the business of managing certain funds, for the benefit of various investors in those funds. In fact, HCMFA and NexPoint have contracts to

manage those funds (the “Fund Agreements”). Pl. Ex. 192 at 66:3-67:6, Appx. 3031. The funds themselves, in turn, are overseen to an extent by a board known as the “Retail Board.” The Retail Board must determine on an annual basis whether to renew the Fund Agreements with HCMFA and NexPoint, a process referred to as a “15(c) Review.” As part of the 15(c) Review, the Retail Board requests information from HCMFA and NexPoint. Pl. Ex. 99 at 129:17-130:3, Appx. 1844-1845, Pl. Ex. 105 at 32:17-33:6, Appx. 2057, 168:9-12, Appx. 2091, 169:9-170:16, Appx. 2091-2092. Mr. Waterhouse, the Treasurer of HCMFA and NexPoint (along with various other officers of HCMFA and NexPoint) participated in the annual 15(c) Review process with the Retail Board. Pl. Ex. 192 at 67:7-68:19, Appx. 3031; Pl. Ex. 105 at 168:13-169:8, Appx. 2091.

The Retail Board, as part of the annual 15(c) Review, asked HCMFA and NexPoint, in October 2020, to provide information regarding any outstanding amounts currently payable or due in the future (e.g., notes) to Highland by HCMFA or NexPoint or to any other affiliate that provided services to the Funds.” Pl. Ex. 36 at p. 3, Appx. 793.

On October 23, 2020, HCMFA and NexPoint provided their formal responses to the questions posed by the Retail Board. As to the issue of outstanding amounts currently payable or due to Highland or its affiliates, HCMFA and NexPoint reported as follows:

As of June 30, 2020, \$23,683,000 remains outstanding to HCMLP [Highland] and its affiliates from NexPoint and \$12,286,000 remains outstanding to HCMLP [Highland] from HCMFA. The Note between HCMLP [Highland] and NexPoint comes due on December 31, 2047. The earliest the Note between HCMLP [Highland] and HCMFA could come due is in May 2021. All amounts owed by each of NexPoint and HCMFA pursuant to the shared services arrangement with HCMLP [Highland] have been paid as of the date of this letter. The Advisor notes that both entities have the full faith and support of James Dondero.

Pl. Ex. 59 at p. 2, Appx. 885.

C. More Corroborating Evidence: Before and During the Highland Bankruptcy Case, the Notes Were Reflected on Highland's Books, Records, and Bankruptcy Paperwork as Assets Owed to Highland, without Discounts

In addition to its PwC-audited financial statements, Highland's contemporaneous books and records—before and after the Petition Date—recorded the Notes as valid debts due and owing by each of the Note Makers Defendants to Highland.

By way of example, the three Dondero Notes, reflecting personal loans to Mr. Dondero, show they were made on February 2, 2018; August 1, 2018; and August 13, 2018, respectively. A February 2018 internal monthly operating results of Highland, underneath a heading “Significant Items Impacting HCMLP's [Highland's] Balance Sheet,” reflected a transfer to Mr. Dondero on February 2, 2018, as “(\$3.8M) partner loan.” Ex. 39 at 1, Appx. 801. And in the Debtor's August 2018 internal monthly operating results, also under a heading “Significant Items Impacting HCMLP's [Highland's] Balance Sheet,” the August 2018 transfers to Mr. Dondero were together contemporaneously identified as “(\$5.0M) partner loan.” *See also* Pl. Ex. 78 at p. 2, Appx. 1362.

Highland's accounting group had a regular practice of creating, maintaining, and updating on a monthly basis “loan summaries” in the ordinary course of business (the “Loan Summaries”). The Loan Summaries identified amounts owed to Highland under affiliate notes and were created by updating underlying schedules for activity and reconciling with Highland's general ledger. Pl. Ex. 199, Appx. 3245-3246 is an example of a Loan Summary. The Loan Summaries identified each Note Maker Defendant by reference to the “GL” number used in the general ledger. *See* Pl. Ex. 199, Appx. 3246 (HCMS (“GL 14530”), HCMFA (“GL 14531”), NexPoint (“GL 14532”), HCRE (“GL 14533”), and Mr. Dondero (“GL 14565”)).

The Debtor's Schedules of Assets and Liabilities [Bankr. DE # 247] (the “Debtor's Schedules”), filed during the Highland bankruptcy case at a time when Mr. Dondero was still under

control of Highland, included all of the Notes among the Debtor's assets. Pl. Ex. 40, Appx. 812-815 (excerpts of the Debtor's Schedules showing that Highland (i) disclosed as assets of the estate "Notes Receivable" in the approximate amount of \$150 million (Item 71), and (ii) provided a description of the Notes (Exhibit D)).

Additionally, all of the Debtor's Monthly Operating Reports filed during the Highland bankruptcy case (including those filed while Mr. Dondero was still in control of the Debtor) included the Notes as assets of the Debtor. *See, e.g.*, Pl. Ex. 41, Appx. 816-825; Pl. Ex. 42, Appx. 826-835; Pl. Ex. 88, Appx. 1475-1486; Pl. Ex. 89, Appx. 1487-1496. *See also* Bankr. DE # 405 (October 2019); Bankr. DE # 289 (November 2019); Bankr. DE # 418 (December 2019); Bankr. DE # 497 (January 2020); Bankr. DE # 558 (February 2020); Bankr. DE # 634 (March 2020); Bankr. DE # 686 (April 2020); Bankr. DE # 800 (May 2020), as amended in Bankr. DE # 905; Bankr. DE # 913 (June 2020); Bankr. DE # 1014 (July 2020); Bankr. DE # 1115 (August 2020); Bankr. DE # 1329 (September 2020); Bankr. DE # 1493 (October 2020); Bankr. DE # 1710 (November 2020); Bankr. DE # 1949 (December 2020); and Bankr. DE # 2030 (January 2021).

V. The Note Maker Defenses

A. The "Oral Agreement" Defense involving Mr. Dondero's Sister

As mentioned earlier, all Note Maker Defendants, besides HCMFA (sometimes referred to by Plaintiff as the "Alleged Agreement Defendants") have asserted as their primary defense to payment on their Notes that there was an alleged "oral agreement," pursuant to which all of the Notes would be forgiven based on certain "conditions subsequent," or if certain assets were sold by a third party. Only Mr. Dondero originally asserted that defense (somewhat obliquely, in his original answer—merely stating that "it was previously agreed that Plaintiff would not collect the

Notes”)²² and thereafter all of the Note Maker Defendants (except HCMFA) amended their pleadings to adopt the same affirmative defense. To be clear, the defense actually evolved over time. First, it was simply an alleged agreement by Highland not to collect on **Mr. Dondero’s** Notes. Then, there were amended answers by each of the other Note Maker Defendants (except HCMFA) which obliquely referred to alleged agreements by Highland not to collect on the Notes upon fulfillment of undisclosed conditions subsequent. Finally, the “oral agreement” defense was set up as follows:

Plaintiff’s claims are barred . . . because prior to the demands for payment Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, [] Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of James Dondero’s control. The purpose of this agreement was to provide compensation to James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at HCMLP [Highland] and in the industry.²³ This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant [] believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

²² Pl. Ex. 80, ¶ 40.

²³ This statement appears to have been false, according to Mr. Dondero’s own executive compensation expert, Alan Johnson. During the deposition of Mr. Johnson, he testified that he reviewed Highland’s audited financial statements for each year from 2008 through 2018 (Pl. Ex. 101 at 119:14-189:21, Appx. 1988-2005) and concluded that (a) Highland did not have a standard practice of forgiving loans and had not forgiven a loan to anyone in the world since 2009, (b) Highland had never forgiven a loan of more than \$500,000, (c) Highland had not forgiven any loan to Mr. Dondero since at least 2008, and (d) since at least 2008, Highland had never forgiven in whole or in part any loan that it extended to any affiliate. *Id.* at 189:24-192:10, Appx. 2005-2006. *See also* Pl. Ex. 98 at 422:18-428:14, Appx. 1776-1778.

Pl. Ex. 31 ¶ 82, Appx. 655 (“Dondero’s Answer”). *See also* Pl. Ex. 15 ¶ 83, Appx. 435-436 (“NexPoint’s Answer”); Pl. Ex. 16 ¶ 97, Appx. 451-452 (“HCMS’s Answer”); and Pl. Ex. 17 ¶ 99, Appx. 468 (“HCRE’s Answer”).

With regard to this “oral agreement” defense, certainly any trial judge should be inclined to send a dispute to a jury when there is any genuine material fact issue raised upon which reasonable minds might disagree. Nonetheless, *there are numerous reasons why this court believes no reasonable jury could find that there was truly an “oral agreement” to forgive these loans to the Alleged Agreement Defendants.* The “oral agreement” defense does not pass the “straight face” test for a myriad of reasons.

First, to be clear, *no document was ever uncovered or produced in discovery to establish, memorialize, or reflect the existence or terms of the alleged “oral agreement.”*

Second, Mr. Dondero could not describe any material terms of the alleged “oral agreement” without relying on a document prepared by counsel. Specifically, without a list prepared by counsel, Mr. Dondero could not identify any of the Notes subject to the alleged “oral agreement” nor could he recall (i) the number of Notes subject to each alleged “oral agreement,” (ii) the maker of each Note subject to each alleged “oral agreement,” (iii) the date of each Note subject to each alleged “oral agreement,” or (iv) the principal amount of any Note subject to the alleged “oral agreement.” Pl. Ex. 99 at 13:4-28:22, Appx. 1815-1819.

Third, according to both Mr. Dondero and Sister Dondero, all of the Notes would be forgiven if Mr. Dondero sold one of three portfolio companies—*Trussway, Cornerstone, or MGM*—above cost. *See* Pl. Ex. 31 ¶ 82, Appx. 655. Notably, in November 2019, Mr. Dondero (while still in control of Highland) caused the sale of a substantial interest in *MGM* for \$123.25

million, a portion of which was for the Debtor's interest in a fund, but failed to declare all of the Notes forgiven, and remained silent about the alleged "oral agreement" altogether. *See* Pl. Ex. 201 ¶¶ 29-30, Appx. 3270-3271; Pl. Ex. 202 ¶ 14, Appx. 4135; Pl. Ex. 203 ¶ 1, Appx. 4143; Pl. Ex. 204 at p. 5 n.5, Appx. 4156.

Fourth, Mr. Dondero separately testified that Highland disclosed to its auditors all loans of a material amount that Highland ever forgave. Pl. Ex. 98 at 426:8-427:15, Appx. 1777. As earlier discussed, no forgiven loans are mentioned anywhere in Highland's audited financial statements.

Fifth, Sister Dondero was simply not capable of entering into any alleged "oral agreement" on behalf of Highland. For one thing, it is undisputed that Sister Dondero had no meaningful knowledge, experience, or understanding of (a) Highland or its business, (b) the financial industry, (c) executive compensation matters, or (d) Mr. Dondero's compensation or whether he was "underpaid compared to reasonable compensation levels in the industry." Pl. Ex. 100 at 42:22-43:8, Appx. 1885, 48:7-61:9, Appx. 1886-1889; 211:8-216:21, Appx. 1927-1928. Sister Dondero resides in Vero Beach, Florida and represents that she owns a private investigations business.²⁴ The only information Sister Dondero purported to have regarding Mr. Dondero's compensation from Highland was that he had told her he "was not highly paid" and that, in recent years, "his salary has been roughly less than a million, 500, 700,000 somewhere in that ballpark." Pl. Ex. 100 at 51:11-22, Appx. 1887.²⁵ But this information was simply inaccurate. Pl. Ex. 68, Appx. 1129-1130 (2016 base salary of \$1,062,500 with total earnings and awards of \$2,287,175); Pl. Ex. 50, Appx. 860-861 (2017 base salary of \$2,500,024 with total earnings and awards of \$4,075,324); Pl. Ex. 51, Appx. 862-863 (2018 base salary of \$2,500,000 with total earnings and awards of

²⁴ *See* Nancy Dondero Dec. DE # 155 in Adv. Proc. No. 21-3003.

²⁵ *See also id.*

\$4,194,925); and Pl. Ex. 52, Appx. 864-865 (2019 base salary of \$2,500,000 with total earnings and awards of \$8,134,500).

Additionally, Sister Dondero never reviewed Highland's financial statements (including balance sheets, bank statements, profit and loss statements, and statements of operations), never asked to see them, and knew nothing about Highland's financial condition prior to the Petition Date. *Id.* at 61:25-63:13, Appx. 1889-1890. Sister Dondero did not know of Highland's "portfolio companies" except for those her brother identified, and as to those, Sister Dondero did not know the nature of Highland's interests in the portfolio companies, the price Highland paid to acquire those interests, or the value of the portfolio companies. *Id.* at 63:18-80:22, Appx. 1890-1894; 208:24-210:13, Appx. 1926-1927.

Still further, Sister Dondero never saw a promissory note signed by Mr. Dondero, nor any other officer or employee of Highland, nor any "affiliate" of Highland. *Id.* at 83:14-84:8, Appx. 1895; 95:3-16, Appx. 1898; 99:20-100:10, Appx. 1899; 115:11-116:4, Appx. 1903; 127:13-128:4, Appx. 1906; 140:15-141:22, Appx. 1909, 180:18-23, Appx. 1919. Sister Dondero purportedly learned from her brother that Highland allegedly had a "common practice" of forgiving loans but had no actual knowledge or information concerning any loan that Highland made to an officer, employee, or affiliate that was actually forgiven and made no effort to verify her brother's statement. *Id.* 84:9-92:3, Appx. 1895-1897, 100:11-103:8, Appx. 1899-1900.

And still further, Sister Dondero had no knowledge regarding any of the Alleged Agreement Defendants (i.e., NexPoint, HCMS, or HCRE), including (a) the nature of their businesses, (b) their relationships with Highland, including whether they provided any services to Highland, (c) their financial condition, or (d) the purpose of the loans made to them by Highland,

and their use of the proceeds. *Id.* at 103:19-115:10, Appx. 1900-1903, 119:5-127:7, Appx. 1904-1906, 129:5-140:14, Appx. 1906-1909.

Finally, and perhaps most important, Sister Dondero (purportedly acting as trustee for Dugaboy—the family trust of which Mr. Dondero was beneficiary, and which was an indirect, majority *limited* partner of Highland) had no authority under the Highland partnership agreement to negotiate and enter into binding agreements on behalf of Highland. Pl. Ex. 2 at Ex. 4, Appx. 57-93.

If this were not all enough, the alleged “oral agreement” was never disclosed to anyone by Mr. Dondero or Sister Dondero. Other than Mr. Dondero and Sister Dondero, no one participated in the discussions that led to the alleged “oral agreement.” Pl. Ex. 100 at 190:16-191:17, Appx. 1922. Sister Dondero and Dugaboy have admitted that (1) neither ever disclosed the existence or terms of the alleged “oral agreement” to anyone, including PwC, Mr. Waterhouse (again, Highland’s CFO), or Highland’s co-founder, Mark Okada,²⁶ and (2) neither ever caused Highland to disclose the existence or terms of the alleged “oral agreement” to the bankruptcy court. Pl. Ex. 25 (Responses to RFAs 1-6, 9-16, responses to Interrogatories 1 & 2, Appx. 538-542); Pl. Ex. 26 (Responses to RFAs 1-6, 9-16, responses to Interrogatories 1 & 2, Appx. 554-558). Mr. Dondero has admitted that he (1) never disclosed the existence or terms of the alleged “oral agreement” to PwC, Mr. Okada, or the bankruptcy court; and (2) never caused Highland to disclose the existence or terms of the alleged “oral agreement” to the bankruptcy court. Pl. Ex. 24 (Responses to RFAs 1, 2, 5-7, 11-17, Appx. 521-524). To be clear, Mr. Dondero represented that he did, indeed, inform Mr. Waterhouse about the alleged “oral agreement.” Pl. Ex. 24, Appx. 521 (Responses to RFAs

²⁶ Mark Okada was not only the co-founder of Highland, but he and his family trusts owned all the limited partnership interests of Highland, other than those interests held by Dugaboy. *See* James Dondero Dec., DE # 155, ¶ 19 in Adv. Proc. No. 21-3003.

3 & 4). However, Mr. Waterhouse—again, the CFO of Highland and an officer of each of the Alleged Agreement Defendants—testified he did not learn of the alleged “oral agreement” until recently and only believes that it was subject to “milestones” that he cannot identify. Pl. Ex. 105 at 65:5-72:14, Appx. 2065-2067, 82:19-84:7, Appx. 2070.

B. The “Mutual Mistake” Defense of HCMFA

The “Mutual Mistake” defense—like the “oral agreement” defense asserted by the other Note Maker Defendants—is farfetched, to say the least, especially in the context of a multi-billion company with perhaps the world’s most iconic and well-known public accounting firm serving as its auditors. As set forth below, this court does not believe any reasonable jury could reach a verdict in favor of HCMFA on the “Mutual Mistake” defense.

To fully understand the defense, a reminder is in order regarding the many hats that Frank Waterhouse wore. Mr. Waterhouse is a Certified Public Accountant who joined Highland in 2006 and served as Highland’s CFO on a continuous basis from approximately 2011 or 2012 until early 2021. While serving as Highland’s CFO, Mr. Waterhouse simultaneously served as (1) an officer of HCMFA, NexPoint, and HCMS, holding the title of Treasurer; and (2) Principal Executive Officer of certain retail funds managed by HCMFA and NexPoint. As Treasurer and Principal Executive Officer of these entities, Mr. Waterhouse was responsible for managing, among other things, HCMFA’s accounting and finance functions. Pl. Ex. 35; Pl. Ex. 37; Pl. Ex. 105 at 18:6-15, 18:23-19:6, 21:15-17, 23:5-20, 25:17-26:8, 27:17-28:16, 29:2-10, 30:9-31:6, 34:12-35:19, 38:20-39:5.

With that in mind, the “Mutual Mistake” defense works as follows. HCMFA asserts that the HCMFA Notes are void or unenforceable because they were signed by mistake or without authority by Mr. Waterhouse, and Mr. Dondero (as the person in charge of both Highland and

HCMFA) *did not intend* for \$7.4 million of funds that were transferred from the Debtor to HCMFA in May 2019 to be loans—rather the money was intended to be *compensation to HCMFA from Highland*, for a Highland error that allegedly cause HCMFA harm. Pl. Ex. 13 ¶¶ 45 & 47, Appx. 412. HCMFA specifically contends that, in March 2019, Highland made a “mistake in calculating” the net asset value (“NAV”) of certain securities that Highland Global Allocation Fund (“HGAF”)—a fund managed by HCMFA—held in a portfolio company called Terrestar (the “NAV Error”). HCMFA maintains that after the NAV Error was discovered in early 2019:

The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. Ultimately, and working with the SEC, the Plaintiff [i.e., Highland] determined that the losses from the NAV Error to HGAF and its shareholders amounted to \$7.5 million: (i) \$6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) \$1.4 million of losses to the shareholders of HGAF.

The Defendant [HCMFA] accepted responsibility for the NAV Error and paid out \$5,186,496 on February 15, 2019 and \$2,398,842 on May 21, 2019. In turn, the Plaintiff [Highland] accepted responsibility to the Defendant [HCMFA] for having caused the NAV Error, and the Plaintiff [Highland] ultimately, whether through insurance or its own funds, compensated the Defendant [HCMFA] for the above payments by paying, or causing to be paid, approximately \$7.5 million to the Defendant [HCMFA] directly or indirectly to HGAF and its investors.

Pl. Ex. 13 ¶¶ 41-42, Appx. 411.

While this is the theory of HCMFA’s “Mutual Mistake” defense, there is an absence of summary judgment evidence to support it. In fact, to the contrary, on May 28, 2019, HCMFA sent a memorandum to the Board of Trustees of HGAF to describe the “Resolution of the Fund’s” NAV Error, and HCMFA *did not mention Highland*. Pl. Ex. 182, Appx. 2978-2980. In fact, no document was submitted to suggest: (a) HCMFA ever told the Securities and Exchange Commission or HGAF Board that Highland, and not HCMFA, was responsible for the NAV Error;

or that (b) Highland ever agreed to “compensate” HCMFA for any mistake it may have made with respect to the NAV Error. *See* Pl. Ex. 192 at 140:7-11, Appx. 3049. While no document exists that corroborates HCMFA’s contention that Highland agreed to pay HCMFA \$7.4 million as compensation for the NAV Error, HCMFA has identified Mr. Dondero as the person who allegedly agreed to make that payment on behalf of Highland. *Id.* at 138:15-19, Appx. 3049.

HCMFA reported to the HGAF Board that the “Estimated Net Loss” from the NAV Error was \$7,442,123. Pl. Ex. 182 at p. 2, Appx. 2980. Notably, HCMFA admits that it filed a claim for and received almost \$5 million in insurance proceeds to fund the loss and had to pay approximately \$2.4 million out-of-pocket to fully cover the estimated loss. *Id.* at p. 2, Appx. 2980; Pl. Ex. 192 at 146:20-25, Appx. 3051. Yet, despite having received approximately \$5 million in insurance proceeds, HCMFA now takes the position that (a) Highland’s subsequent transfer of \$7.4 million to HCMFA was “compensation” for Highland’s negligence and (b) HCMFA was entitled to receive both and \$5 million in insurance proceeds and \$7.4 million in “compensation” from Highland, even though the total loss was only \$7.4 million. It is undisputed that HCMFA never told its insurance carrier, ICI Mutual, that Highland was at fault or that Highland paid HCMFA \$7.4 million as compensation for the same loss the carrier covered. Pl. Ex. 192 at 133:14-150:22, Appx. 3047-3052.

In summary, according to HCMFA, “it received \$7.4 million from Highland as compensation, and approximately \$5 million from the insurance carrier as compensation for a total receipt of \$12.4 million in connection with the [NAV Error].” *Id.* at 147:4-11, Appx. 3051. There is no evidence that HCMFA ever told ICI Mutual that Highland made HCMFA “whole” or otherwise compensated HCMFA approximately \$5 million dollars in connection with the NAV Error—the same amount HCMFA recovered from ICI Mutual in connection with the NAV Error.

To be clear, similar to all other Notes involved in this litigation, the HCMFA Notes were carried on its balance sheet and audited financial statements as liabilities. Pl. Ex. 45 at p. 17; Pl. Ex. 192 at 49:19-50:2, 54:6-9, 54:22-55:8, 55:23-56:3, 56:20-59-3, Appx. 3026-3029. There is nothing in HCMFA's books and records that corroborates HCMFA's contention that the payments from Highland to HCMFA in exchange for the HCMFA Notes were intended to be compensation and not a loan. Pl. Ex. 192 at 59:8-63:20, Appx. 3029-3030. And Highland's bankruptcy filings (most or all of which were signed by Mr. Waterhouse—both the CFO of Highland and the Treasurer of HCMFA) contradict HCMFA's "Mutual Mistake" defense. As discussed earlier, Highland's contemporaneous books and records—before the Petition Date and after—recorded the HCMFA Notes as valid debts due and owing by HCMFA to Highland.

In summary, there is no evidence that creates any genuine issue of "Mutual Mistake." If one assumes that Mr. Waterhouse might have made a mistake in authorizing the preparation and execution of the HCMFA Notes,²⁷ then one must likewise assume that he compounded the mistake well over a dozen times when he (i) signed off on Highland's and HCMFA's audited financial

²⁷ There can be no genuine dispute regarding Mr. Waterhouse's authority to execute the Notes on behalf of HCMFA. "The term 'actual authority' denotes that authority that a principal intentionally confers upon an agent or intentionally allows the agent to believe himself to possess." *Pollard & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App. 1992). Apparent authority arises when the "principal has acted in a manner that manifests the alleged agent's authority and whether the third party reasonably relied on the agent's authority." *Commercial Capital Holding Corp. v. Team Ace Joint Venture*, Civ. Action No. 99-3040, 2000 WL 726880, at *5 (E.D. La. June 2, 2000). The undisputed evidence establishes that Mr. Waterhouse had both actual and apparent authority to sign the Notes. At the time Mr. Waterhouse executed the Notes on behalf of HCMFA, Mr. Waterhouse was the Treasurer of HCMFA. See Incumbency Certificate (Pl. Ex. 35, Appx. 789). As Treasurer, he was authorized to, inter alia, "execute any and all agreements on behalf of the General Partner [of HCMFA] in its capacity as the general partner of [HCMFA]." *Id.* In this role, Mr. Waterhouse managed the accounting and finance for HCMFA. (Pl. Ex. 105 at 25:22-26:3, Appx. 2055-2056). Mr. Waterhouse testified that he "signed a lot of documents in [his] capacity" as Treasurer, and believed he was authorized to sign the HCMFA Notes. *Id.* at 143:24-25, Appx. 2085. To Mr. Waterhouse, the Notes were "just another document." *Id.* at 144:2-3, Appx. 2085. No one at HCMFA ever told Mr. Waterhouse that, as the Treasurer of HCMFA, he did not possess such authority. *Id.* at 158:2-16, Appx. 2089. At the time he signed the Notes on behalf of HCMFA, Mr. Waterhouse had no reason to believe he was not authorized to do so. *Id.* at 160:23-161:2, Appx. 2089. In fact, Mr. Waterhouse would not have signed the Notes on behalf of HCMFA if he did not believe he possessed such authority. *Id.* at 144:4-20, Appx. 2085. The Incumbency Certificate, which named Mr. Waterhouse as the Treasurer of HCMFA, gave Mr. Waterhouse "comfort" that he was authorized to sign the Notes. *Id.* at 159:13-160:4, Appx. 2089.

statements, (ii) included the HCMFA Notes as liabilities on HCMFA's own balance sheet, and (iii) prepared each of the Debtor's MORs and other court filings. No reasonable jury could go there—particularly when the defense is based on mostly self-serving conclusory statements of Mr. Dondero and not any tangible evidence.²⁸

C. Miscellaneous Defenses

Mr. Dondero also raised the affirmative defenses of waiver, estoppel, or lack of consideration. There is no summary judgment evidence in the record that supports his affirmative defenses of waiver, estoppel, or lack of consideration. Pl. Ex. 98 at 357:24-360:14, Appx. 1760-1761.

With regard to the term loans of NexPoint, HCRE, and HCMS, these Note Maker Defendants each also contend that they made prepayments on their Notes, such that they cannot be deemed to have defaulted, and also assert they did not default under those loans because of Annual Installment payments that they made. First, the unrefuted summary judgment evidence of Plaintiff clearly dispels any argument that prepayments may have averted any defaults. *See* Klos Dec. pp. 3-6; Pl. Ex. 198 (Loan Summaries). Moreover, the Annual Installment payments were due on December 31, 2020, and these Note Maker Defendants did not make their Annual Installment payments to Highland until mid-January 2021, after receiving notices of default. These Note Maker Defendants had no right to cure in the loan documents. Thus, this defense fails as a matter of law. *See* Pl. Ex. 2 at Ex. 3, Appx. 49-56; Pl. Ex. 98 at 362:12-366:10, Appx. 1761-1762, 370:6-11, Appx. 1763, 389:10, Appx. 1768.

²⁸ One disturbing aspect of both the “Mutual Mistake” defense and the “oral agreement” defense is that, if they are to be believed, it means the audited financial statements of Highland and the Note Maker Defendants were materially misleading for several years. What human being(s) would be held accountable for this? Mr. Dondero himself? *See* Pl. Ex. 33.

Finally, the “Alleged Agreement Defendants” pleaded defenses of “justification and/or repudiation; estoppel; waiver; and ambiguity.”²⁹ No summary judgement evidence supported these affirmative defenses or any other defenses that were otherwise raised.³⁰

V. Legal Standard

It is, of course, well settled that summary judgment is appropriate if a movant shows there is no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law. **FED. R. CIV. P. 56(c)**; *see also Warfield v. Byron*, **436 F.3d 551, 557** (5th Cir. 2006) (“[S]ummary judgment is proper when the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’”) (quoting **FED. R. CIV. P. 56(c)**). A movant meets its initial burden of showing there is no genuine issue for trial by “point[ing] out the absence of evidence supporting the nonmoving party's case.” *Latimer v. Smithkline & French Lab'ys*, **919 F.2d 301, 303** (5th Cir.1990); *see also In re Magna Cum Latte, Inc.*, Bankr. No. 07-31814, **2007 WL 3231633**, at *3 (Bankr. S.D. Tex. Oct. 30, 2007) (“A party seeking summary judgment may demonstrate: (i) an absence of evidence to support the non-moving party's claims or (ii) the absence of a genuine issue of material fact.”). “If the moving party carries [its] initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of genuine issue of material fact.” *Latimer*, **919 F.2d at 303**; *see also Nat'l Ass'n of Gov't*

²⁹ Mr. Dondero, who signed twelve of the sixteen Notes, testified that he did not read the Notes. Thus, he cannot rely on ambiguity as a defense. *See* Pl. Ex. 96 at 111:19-21; 125:13-20; 128:23-129:7.

³⁰ One stray defense alleged by HCMS, HCRE, and NexPoint, with regard to each of their Term Notes, is that they had “Shared Services Agreements” with Highland and, thus, Highland “made” them default by not directing them to make their Annual Installment payments timely in December 2021. First, as a technical matter, there was no admissible evidence that HCMS and HCRE had a shared service agreement with Highland. Second, while NexPoint did have a Shared Services Agreement with Highland, no provision authorized or obligated Highland to control NexPoint’s bank accounts or to effectuate payments without instruction or direction from an authorized representative. *See* Pl. Ex. 205. Section 2.02 provided that “for the avoidance of doubt . . . [Highland] shall not provide any advice to [NexPoint] to perform any duties on behalf of [NexPoint], other than back- and middle-office services contemplated herein.”

Emps v. City Pub. Serv. Bd. of San Antonio, Tex., 40 F.3d 698, 712 (5th Cir. 1994) (“To withstand a properly supported motion for summary judgment, the nonmoving party must come forward with evidence to support the essential elements of its claim on which it bears the burden of proof at trial.”) “This showing requires more than some metaphysical doubt as to the material facts.” *Latimer*, 919 F.2d at 303 (internal quotations omitted); *see also Hall v. Branch Banking*, No. H-13-328, 2014 WL 12539728, at *1 (S.D. Tex. Apr. 30, 2014) (“[T]he nonmoving party's bare allegations, standing alone, are insufficient to create a material dispute of fact and defeat a motion for summary judgment.”); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (“[A] party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence.”) (internal quotations omitted). “Where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate.” *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 199 (5th Cir. 1999); *see also Armstrong v. City of Dallas*, 997 F.2d 62, 66 n.12 (5th Cir.1993) (“We no longer ask whether literally little evidence, i.e., a scintilla or less, exists but, whether the nonmovant could, on the strength of the record evidence, carry the burden of persuasion with a reasonable jury.”).

VI. Legal Analysis

A. *The Context Here Matters: Promissory Notes are at Issue*

It has often been said that “suits on promissory notes provide ‘fit grist for the summary judgment mill.’” *Resolution Tr. Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995) (quoting *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir. 1988)); *see also Looney v. Irvine Sensors Corp.*, Civ. Action No. 3:09-CV-0840-G, 2010 WL 532431, at *2 (N.D. Tex. Feb. 15, 2010) (“Suits on promissory notes are typically well-suited for resolution via summary

judgment.”). To prevail on summary judgment for breach of a promissory note under Texas law, the movant need not prove all essential elements of a breach of contract, but only must establish (i) the note in question, (ii) that the non-movant signed the note, (iii) that the movant was the legal owner and holder thereof, and (iv) that a certain balance was due and owing on the note. *See Resolution*, 41 F.3d at 1023; *Looney*, 2010 WL 532431, at *2-3; *Magna Cum Latte*, 2007 WL 3231633, at *15.

Highland has made its prima facie showing that it’s entitled to summary judgment on each of the Note Maker Defendants’ breach of their respective Notes.

With regard to the Dondero Demand Notes, the evidence was that they were valid, signed by Mr. Dondero in Highland’s favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the Dondero Notes was \$9,263,365.05. Klos Dec. ¶¶ 18-20, Exs. D, E, F; ¶ 37.

With regard to the HCMFA Demand Notes, the evidence was that they were valid, signed by HCMFA in Highland’s favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCMFA Notes was \$7,874,436.09. Klos Dec. ¶¶ 21-22, Exs. G, H; ¶ 40.

With regard to the HCMS Demand Notes, the evidence was that they were valid, signed by HCMS in Highland’s favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCMS Term Notes was \$972,762.81. Klos Dec. ¶¶ 23-26, Exs. I, J, K, L; ¶ 45.

With regard to the HCRE Demand Notes, the evidence was that they were valid, signed by HCRE in Highland’s favor and as of December 17, 2021, the total outstanding principal and

accrued but unpaid interest due under the HCRE Demand Notes was \$5,330,378.23. Klos Dec. ¶¶ 27-30, Exs. M, N, O, P; ¶ 50.

With regard to the NexPoint Term Note, the evidence was that it was valid, signed by NexPoint in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the NexPoint Term Note was \$24,383,877.27.³¹ Klos Dec. ¶ 31, Ex. A; ¶ 51.

With regard to the HCMS Term Note, the evidence was that it was valid, signed by HCMS in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCMS Term Note was \$6,748,456.31.³² Klos Dec. ¶ 32, Ex. R; ¶ 52.

With regard to the HCRE Term Note, the evidence was that it was valid, signed by HCRE in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCRE Term Note was \$5,899,962.22.³³ Klos Dec. ¶ 33, Ex. S; ¶ 53.

Each of the Note Maker Defendants under the Demand Notes breached their obligations by failing to pay Highland all amounts due and owing upon Highland's demand. Each of the Note Maker Defendants under the Term Notes breached their obligations by failing to make the Annual Installment payment due on December 31, 2020.

³¹ Total unpaid principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of \$1,406,111.92 made January 14, 2021, which reduced the total principal and interest then-outstanding.

³² Total unpaid outstanding principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of \$181,226.83 made January 21, 2021, which reduced the total principal and interest then-outstanding.

³³ Total unpaid principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of \$665,811.09 made January 21, 2021, which reduced the total principal and interest then-outstanding.

The Reorganized Debtor, Highland, has been damaged by the Note Maker Defendants' breaches in the amounts set forth above, plus the interest that has accrued under the Notes since those calculations, plus collection costs and attorneys' fees—which amounts Highland should separately submit to the court.

In summary, Highland has made its prima facie case for summary judgment for the Note Makers Defendants' breach of the Notes. *See Resolution*, 41 F.3d at 1023 (holding that where affidavit "describes the date of execution, maker, payee, principal amount, balance due, amount of accrued interest owed, and the date of default for each of the two promissory notes," movant "presented a prima facie case of default on the notes."); *Looney*, 2010 WL 532431, at *2-3 (where movant "has attached a copy of the note ... to a sworn affidavit in which he states that the photocopy is a true and correct copy of the note, that he is the owner and holder of the note, and that there is a balance due on the note ... [movant] has made a prima facie case that he is entitled to summary judgment on the note.").

The Note Maker Defendants failed to rebut Highland's prima facie case.

B. The Unsubstantiated "Oral Agreements"

With regard to the alleged "oral agreement" defense, there was a complete lack of evidence for it—it was only supported by conclusory statements of Mr. Dondero and, to a lesser extent, Sister Dondero. Mr. Dondero could not identify any material terms of the alleged "oral agreement," such as (a) which Notes are subject to the alleged "oral agreement;" (b) the number of Notes subject to the alleged "oral agreement;" (c) the maker of each Note subject to the alleged "oral agreement;" (d) the date of each Note subject to the alleged "oral agreement;" or (e) the principal amount of any Note subject to the alleged "oral agreement." Mr. Dondero and Sister Dondero

cannot even agree whether Mr. Dondero identified the Notes subject to the alleged agreement. Mr. Dondero sold MGM stock in November 2019—an alleged “condition subsequent” under the alleged agreement—but failed to declare the Notes forgiven, and otherwise remained silent about the alleged agreement. Sister Dondero, the counter-party to the alleged agreement, never saw a Note signed by Mr. Dondero or any affiliate of Highland and was not qualified to enter into the alleged agreement. The existence or terms of the alleged agreement were never disclosed by Mr. Dondero or Sister Dondero to anyone, including PwC, Mr. Waterhouse, or the bankruptcy court. No document exists memorializing or otherwise reflecting the existence of terms of the alleged agreement. There is no history of loans being forgiven at Highland in the past decade.

No genuine issue of material fact has been raised here such that a reasonable jury might find an alleged “oral agreement.” Moreover, any alleged agreement would be unenforceable as a matter of law for lack of: (a) consideration, (b) definiteness, and (c) a meeting of the minds. In order to be legally enforceable, a contract “must address all of its essential and material terms with a reasonable degree of certainty and definiteness.” *Scott v. Wollney*, No. 3:20-CV-2825-M-BH, 2021 WL 4202169, at * 7 (N.D. Tex. Aug. 28, 2021) (internal quotations omitted); *In re Heritage Org., L.L.C.*, 354 B.R. 407, 431–32 (Bankr. N.D. Tex. 2006) (In order to prove existence of a valid and binding subsequent oral agreement binding upon parties, a party must prove that there was “(1) a meeting of the minds” and “(2) consideration to support such a subsequent oral agreement.”) “Whether a contract contains all of the essential terms for it to be enforceable is a question of law.” *Id.* (internal quotations omitted). “A contract must also be based on valid consideration.” *Id.* “In determining the existence of an oral contract, courts look at the communications between the parties and the acts and circumstances surrounding those communications.” *Melanson v. Navistar, Inc.*, 3:13-CV- 2018-D, 2014 WL 4375715, at *5 (N.D. Tex. Sept. 4, 2014). *See also id.* at *6

(finding that a reasonable trier of fact could not find that based on the oral conversation between the plaintiff and the defendant that there was an offer, an acceptance, and a meeting of the minds because the conversation did not contain all essential terms); *Wollney*, 2021 WL 4202169, at *8 (finding that “[w]hen, as here, ‘an alleged agreement is so indefinite as to make it impossible for a court to ‘fix’ the legal obligations and liabilities of the parties, a court will not find an enforceable contract,” finding that party “has not identified evidence of record that would allow a reasonable trier of fact to find that there was an offer, an acceptance, and a meeting of the minds between Plaintiff and Defendant.”) (quoting *Crisalli v. ARX Holding Corp.*, 177 F. App'x 417, 419 (5th Cir. 2006) (citation omitted)); *Heritage*, 354 B.R. at 431–32 (finding a “subsequent oral amendment” defense fails where the summary judgment record does not support the existence of a subsequent agreement).

Accordingly, there is no genuine issue of material fact regarding the alleged “oral agreement” defense, and Highland is, therefore, entitled to summary judgment on Mr. Dondero’s, NexPoint’s, HCMS’s, and HCRE’s breach of their respective Notes.

C. The Alleged “Mutual Mistake” Asserted by HCMFA is Unsubstantiated

Finally, the “Mutual Mistake” defense also fails as a matter of law because there is no evidence to show that Highland and HCMFA were acting under some shared factual mistake when the HCMFA Notes were prepared and executed. “For mutual mistake to nullify a promissory note, the evidence must show that both parties were acting under the same misunderstanding of the same material fact.” *Looney*, 2010 WL 532431, at *5 (internal quotations omitted) (citing Texas law). “[A] party must show that there exists (1) a mistake of fact, (2) held mutually by the parties, (3) which materially affects the agreed upon exchange.” *Whitney Nat’l Bank v. Med. Plaza Surgical Ctr. L.L.P.*, No. H-06 1492, 2007 WL 3145798, at *6 (S.D.Tex. Oct. 27, 2007) (alteration in

original) (citing Texas law). In other words, “[m]utual mistake of fact occurs where the parties to an agreement have a common intention, but the written instrument does not reflect the intention of the parties due to a mutual mistake.” *Id.* (internal quotations omitted). “In determining the intent of the parties to a written contract, a court may consider the conduct of the parties and the information available to them at the time of signing in addition to the written agreement itself.” *Id.* (internal quotations omitted). “When mutual mistake is alleged, the party seeking relief must show what the parties' true agreement was and that the instrument incorrectly reflects that agreement because of a mutual mistake.” *Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., Inc.*, MO:19-CV-173-DC, [2021 WL 2772808](#), at *9 (W.D. Tex. Apr. 28, 2021) (internal quotations omitted). “The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent ... but rather solely by objective circumstances surrounding execution of the [contract.]” *Hitachi Cap. Am. Corp. v. Med. Plaza Surgical Ctr., L.L.P.*, Civ. Action No. 06-1959, [2007 WL 2752692](#), at *6 (S.D. Tex. Sept. 20, 2007) (internal quotations omitted). “The purpose of the mutual mistake doctrine is not to allow parties to avoid the results of an unhappy bargain.” *Whitney*, [2007 WL 3145798](#), at *7 (internal quotations omitted).

The undisputed documentary and testimonial evidence overwhelmingly establish that both HCMFA and Highland intended the HCMFA Notes to be loans. As discussed above: (i) Mr. Waterhouse, HCMFA's Treasurer, knew the money Highland transferred to HCMFA was being treated as an “intercompany loan”; (ii) the HCMFA Notes have always been recorded as liabilities in HCMFA's audited financial statements and balance sheets; (iii) the HCMFA Demand Notes were reflected as assets in Highland's Bankruptcy filings, and (iv) the HCMFA Demand Notes were represented as “liabilities” to third parties at all relevant times.

There is no evidence in support of HCMFA's contention that there existed a mistake of fact held by both Highland and HCMFA when entering into HCMFA Notes. The purported "mistake" was never disclosed to critical (or any) third parties, such as: (i) the Retail Board or (ii) the insurance company ICI Mutual. The purported "mistake" is also not reflected in HCMFA's books and records or audited financials.

In conclusion, HCMFA's "Mutual Mistake" defense fails as a matter of law. *See Hitachi*, 2007 WL 2752692, at *6 (finding "mutual mistake" defense fails as a matter of law where "there is no evidence that a mutual mistake was made in the [agreement,]" and where "the fact that [defendant] did not discover the 'mistake' until well after the [] agreements were signed undermines" the mutual mistake defense.); *Whitney*, 2007 WL 3145798, at *6-7 (finding defendants' assertion of mutual mistake "fails as a matter of law" where assertions were "insufficient to raise a fact issue as to mutual mistake of fact" regarding written agreement where plaintiff "has presented competent evidence" of its own intention regarding the agreement, "there is no evidence that [plaintiff] had the intent that these defendants assert," "no document suggests any such intent," and where "the documents are clear" on their face); *Looney*, 2010 WL 532431, at *5 (granting summary judgment in favor of plaintiff for breach of note as a matter of law on "mutual mistake" defense where defendant "does not cite any record evidence in support of its claim that [parties] were operating under a shared mistake when they executed the note."); *Al Asher & Sons*, 2021 WL 2772808, at *9 (finding that defendant failed to carry its burden to establish there is a genuine issue of material fact as to mutual mistake under an agreement, noting that "mutual mistake [defense] is inapplicable [as a matter of law], because, even if [defendant's] assumption regarding the ... contract is a mistake of fact, there is no evidence in the record that Plaintiff and [defendant] mutually held the mistake ...").

There is no summary judgment evidence to support any remaining defenses of the Note Makers Defendants.

VII. Summary Judgment.

Accordingly, summary judgment should be entered holding the Note Maker Defendants liable for (a) breach of contract and (b) turnover for all amounts due under the Notes, pursuant to Bankruptcy Code Section 542, including the costs of collection and reasonable attorneys' fees in an amount to be determined. Specifically:

With regard to the Dondero Demand Notes, Mr. Dondero should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **\$9,263,365.05**, the total outstanding principal and accrued but unpaid interest due under the Dondero Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMFA Demand Notes, HCMFA should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **\$7,874,436.09**, the total outstanding principal and accrued but unpaid interest due under the HCMFA Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMS Demand Notes, HCMS should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **\$972,762.81**, the total outstanding principal and accrued but unpaid interest due under the HCMS Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMS Term Note, HCMS should be liable on a Judgment for breach of contract and turnover in the amount of: (a) \$6,748,456.31, the total outstanding principal and accrued but unpaid interest due under the HCMS Term Note as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCRE Demand Notes, HCRE should be liable on a Judgment for breach of contract and turnover in the amount of: (a) \$5,330,378.23, the total outstanding principal and accrued but unpaid interest due under the HCRE Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCRE Term Note, HCRE should be liable on a Judgment for breach of contract and turnover in the amount of: (a) \$5,899,962.22, the total outstanding principal and accrued but unpaid interest due under the HCRE Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the NexPoint Term Note, NexPoint should be liable on a Judgment for breach of contract and turnover in the amount of: (a) \$24,383,877.27, the total outstanding principal and accrued but unpaid interest due under the NexPoint Term Note as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

Submission of Judgment. The bankruptcy court directs Plaintiff to promptly submit a form of Judgment applicable to each Note Maker Defendant that calculates proper

amounts due pursuant to this Report and Recommendation, including interest accrued to date (and continuing to accrue per diem), as well as costs and attorneys' fees incurred. The costs and attorneys' fees calculation shall be separately filed as a Notice with backup documentation attached. The Note Maker Defendants shall have 21 days after the filing of such Notice to file an objection to the reasonableness of the attorneys' fees and costs. The bankruptcy court will thereafter determine the reasonableness in Chambers (unless the bankruptcy court determines that a hearing is necessary) and will promptly submit the form Judgments, along with appropriate attorneys' fees and costs amounts inserted into the form Judgments, to the District Court, to consider along with this Report and Recommendation. This Report and Recommendation is immediately being sent to the District Court.

End of Report and Recommendation